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Supreme Court of the United States

October Term, 1960.

No. 41

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA,

Petitioners,

v.

ANGELINA INTILLE, THOMAS DEACON
and SADIE T. ATKINSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No.

BOARD OF PUBLIC EDUCATION, SCHOOL DISTRICT OF PHILADELPHIA,

Petitioner,

v.

ANGELINA INTILLE, THOMAS DEACON AND SADIE T. ATKINSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Board of Public Education, School District of Philadelphia prays that a Writ of Certiorari issue to review the judgments of the Supreme Court of Pennsylvania entered in the above entitled cases on June 30, 1960.

CITATIONS TO OPINIONS BELOW.

The opinions of the Superintendent of Public Instruction of Pennsylvania are unreported and are printed in Appendix B hereto, *infra*, pp. 2a-29a. The opinions of the Courts of Common Pleas of Philadelphia County are unreported and are printed in Appendix B, hereto, *infra*,

pp. 30a-54a. The opinion of the Supreme Court of Pennsylvania, together with concurring opinion and dissenting opinion, are reported in 401 Pa. 1, — A. 2d —, and are printed in Appendix B hereto, *infra*, pp. 55a-113a.

JURISDICTION.

The judgments of the Supreme Court of Pennsylvania were entered on June 30, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3). The question of whether respondents' dismissals from employment violated the due process clause of the Fourteenth Amendment was first raised by the several respondents in their exceptions filed in the Courts of Common Pleas of Philadelphia County on their appeals from the decisions of the State Superintendent of Public Instruction, of Pennsylvania. Each of the three Courts of Common Pleas determined the constitutional question adversely to respondents and in favor of petitioner. Respondents raised this constitutional question again in their brief and argument on their appeals to the Supreme Court of Pennsylvania, and that court determined the questions in favor of respondents holding that the dismissal of the respondents from their employment was in violation of the due process clause of the Fourteenth Amendment.

The question of whether the dismissals violated the privileges and immunities clause of the Fourteenth Amendment was first raised by the respondents in their brief and argument in the Supreme Court of Pennsylvania. That Court determined this issue also in favor of the respondents.

QUESTIONS PRESENTED.

1. Does the dismissal of a public school teacher on the ground of incompetency for refusing to answer questions concerning his former subversive affiliations in a public hearing before a Committee of the Congress of the United States with a claim of privilege against self-incrimination under the Fifth Amendment of the Constitution of the United States violate the due process clause of the Fourteenth Amendment?

2. Does such dismissal abridge any privilege or immunity of citizens of the United States within the meaning of the privileges and immunities clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provisions involved are the Fifth and Fourteenth Amendments of the Constitution of the United States. They are printed in Appendix A, *infra*, p. 1a.

The statutory provision involved is Article XI, Section 1122 of the Public School Code of Pennsylvania, Act of March 10, 1949, P. L. 30, 24 Purdon's Penna. Statutes Ann. Section 11-1122. It is printed in Appendix A, *infra*, p. 1a.

STATEMENT.

The respondents were dismissed in May and June of 1954 from their positions as public school teachers in Philadelphia, by The Board of Public Education of the School District of Philadelphia, following separate hearings before the Board. The Superintendent of Public Instruction of the Commonwealth of Pennsylvania affirmed their dismissals in January 1955. On their separate appeals to the Courts of Common Pleas of Philadelphia County, those courts affirmed the orders of the Superintendent of Public Instruction and upheld the dismissal.

The respondents took separate appeals to the Supreme Court of Pennsylvania, which were consolidated for briefs, argument and opinion. The Supreme Court of Pennsylvania reversed the decisions below and held that the dismissals of respondents violated both the due process clause and the privileges and immunities clause of the Fourteenth Amendment of the Constitution of the United States.

Each of the respondents had been employed as a teacher in the Philadelphia public school system for several years prior to dismissal. Each appeared, pursuant to subpoena, before a Subcommittee of the Committee on Un-American Activities of the House of Representatives, Congress of the United States. In 1954 the Subcommittee was holding hearings to investigate the extent of Communist infiltration in education. At the time the respondents appeared, the Subcommittee was investigating the extent of Communist infiltration in the Philadelphia public school system.

Each of the respondents gave the Congressional Subcommittee his or her name, address and resumé of education and employment record. Each of the respondents was informed by counsel for the Committee that the Committee had received sworn testimony that the respondent had been a member of the Communist Party and of particular groups and organizations which were either a part of the Com-

munist Party or connected with it, and was asked whether he had been a member of such Party or group. Each refused to answer these questions of the Congressional Committee, and each respondent gave as a reason for refusing to answer, the privilege against self-incrimination under the Fifth Amendment of the Constitution.

The respondents were separately charged by the Board of Public Education with incompetency, based on their refusal to answer the questions of the Congressional Committee. The charges were brought under the Pennsylvania Public School Code of 1949, P. L. 30, Section 1122, 24 Purdon's Penna. Statutes, Ann. Section 11-1122.

Each teacher was given a full hearing before the Board of Public Education on these charges, each was represented by counsel at the hearing and was given the opportunity to testify. Respondent Deacon offered testimony at his hearing, endeavoring to explain his conduct before the Congressional Committee. Respondents Intille and Atkinson were present at their hearings but did not testify.

After the hearings before the Board, the Board found that the conduct of these teachers before the Congressional Subcommittee made them incompetent and ordered them dismissed. These dismissals were affirmed by the Superintendent of Public Instruction of Pennsylvania on an administrative appeal provided in the Public School Code. On appeal to the Courts of Common Pleas of Philadelphia County, each of the three separate courts hearing these cases held that no constitutional rights of the respondents had been violated and upheld their dismissals, partly on the authority of *Board of Public Education, School District of Philadelphia v. Beilan*, 386 Pa. 82, 125 A. 2d 327, affirmed, *Beilan v. Board of Public Education, School District of Philadelphia*, 357 U. S. 399.

On appeal to the Supreme Court of Pennsylvania that court reversed the decisions and ordered the reinstatement of the respondents in a six-to-one decision. The Supreme Court of Pennsylvania held that the *Beilan* decision did not

govern the present appeals, that the decision of this Court in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, was controlling and therefore the dismissals violated the due process clause of the Fourteenth Amendment, and that dismissal from public employment on the ground of refusal to answer questions of a Congressional Committee on a plea of the Fifth Amendment also violated the privileges and immunities clause of the Fourteenth Amendment.

The Supreme Court of Pennsylvania held that where there is a refusal to answer coupled with a plea of the privilege against self-incrimination under the Fifth Amendment, the refusal to answer can not be separated from the exercise of the constitutional privilege, and that dismissal for refusal to answer on this ground constitutes the imposition of a penalty for exercising a constitutional privilege and therefore violates the privileges and immunities clause of the Fourteenth Amendment.

The Court also held that the refusal to answer under a plea of constitutional privilege did not prove the teacher's incompetency and was not relevant as evidence of incompetency.

REASONS FOR GRANTING THE WRIT.

The decision of the Supreme Court of Pennsylvania misconstrues the effect of the decision of this court in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551 (1956). It is also inconsistent in principle with the decisions of this court in *Lerner v. Casey, et al.*, 357 U. S. 468 (1958), *Beilan v. Board of Public Education School District of Philadelphia*, 357 U. S. 399 (1958), and *Nelson, et al. v. County of Los Angeles*, 362 U. S. 1 (1960).

In the *Slochower* case, this court reversed the summary dismissal of a teacher in a public college under a New York City Charter provision which made the act of claiming the privilege against self-incrimination operate automatically to discharge the employee without hearing.

The Supreme Court of Pennsylvania in the present cases held that the *Slochower* decision was not based merely on the summary character of the dismissal, but also on the substantive ground that it violated a public employee's constitutional rights to dismiss him for refusing to testify in a Congressional hearing if he relied on the plea of the privilege under the Fifth Amendment.

The court below stated that this Court reached its conclusion in the *Slochower* case on the ground of a "'built-in' inference of guilt, derived solely from a Fifth Amendment claim" provided by the New York statute, and concluded that the Board of Public Education in the present cases also sought to "build-in" a similar inference of guilt in the present cases without "the activation of statute".

In reaching this conclusion, the court below ignored the fact that in *Slochower* this Court found a "built-in" inference of guilt because the New York City Charter made dismissal from employment follow automatically upon the claim of the privilege. Under the New York City Charter dismissal was inevitable and mandatory and therefore lacking in an allowance of discretion to the proper supervisory officials and in protective procedures, and it was therefore held unconstitutional. The important distinction between the present appeals and *Slochower* is that the respondents in the present cases were dismissed, not because they claimed the privilege against self-incrimination under the Fifth Amendment, but because they refused to answer the Congressional Committee and showed by their conduct that they were unfit to be teachers in our public schools. As Mr. Justice Burton, speaking for the majority of this Court said in the *Beilan* case, "In the instant case no inferences at all were drawn from petitioner's refusal to answer. The Pennsylvania Supreme Court merely equated refusal to answer the employing Board's relevant questions with statutory 'incompetency'. Inasmuch as petitioner's dismissal did not violate the Federal Constitution, the judgment of the Supreme Court of Pennsylvania is affirmed" (357 U. S. 399, 409).

The Supreme Court of Pennsylvania concluded that when the refusal to answer is on the ground of the Fifth Amendment privilege, there is no distinction between dismissal for refusal to answer and dismissal for claim of constitutional privilege. In so concluding, the court ignored the force of this Court's decisions in *Lerner v. Casey* and *Nelson et al. v. County of Los Angeles*.

In both of these cases, decided subsequent to Slochower, this Court upheld the dismissal of public employees for refusal to answer, even though the employees' refusal to answer was grounded on a plea of the privilege against self-incrimination.

In the *Lerner* case, this Court upheld the dismissal of Lerner as a subway conductor employed by the New York City Transit Authority because of his refusal to answer under a claim of privilege against self-incrimination when questioned by the New York City Commissioner of Investigation as to whether he was a member of the Communist Party. This Court upheld his dismissal for refusing to answer, and held that such dismissal was not contrary to the decision in the *Slochower* case, not only because the Commissioner's investigation was a state and not a federal inquiry, but also because Lerner refused to answer the questions asked of him. This Court sustained Lerner's dismissal although he also coupled his refusal with a plea of privilege against self-incrimination and although he argued that the public employer was drawing an inference of guilt from his refusal to answer. This Court considered that if Lerner had not claimed any privilege, his dismissal for refusal to answer would not infringe any constitutional right. It then considered the further question whether dismissal was barred by the Constitution when the refusal was coupled with a plea of privilege against self-incrimination, and concluded that the employee's claim of the privilege did not preclude New York from concluding that his failure to answer rendered him a person of doubtful trust and reliability (357 U. S. 477-479).

In *Nelson et al. v. Los Angeles County*, this Court reached the same conclusion in upholding the dismissal of Globe, a civil service employee of Los Angeles County for refusal to answer the Subcommittee of the Un-American Activities Committee of the Congress. Globe relied on the Fifth Amendment. The Court considered Globe's contention that the *Slochower* case barred his dismissal. In distinguishing *Slochower*, this Court said, 362 U. S. 6-8:

> "We, therefore, reach Globe's contention that his summary discharge was nevertheless arbitrary and unreasonable. In this regard he places his reliance on *Slochower v. Board of Education*, 350 U. S. 551 (1956). However, the New York statute under which Slochower was discharged specifically operated 'to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge.' *Id.*, at 558. This 'built-in' inference of guilt, derived solely from a Fifth Amendment claim, we held to be arbitrary and unreasonable. But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing. See *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Adler v. Board of Education*, 342 U. S. 485 (1952). Moreover it must be remembered that here—unlike *Slochower*—the Board had specifically ordered its employees to appear and answer.

We conclude that the case is controlled by *Beilan v. Board of Education of Philadelphia*, 357 U. S. 399 (1958), and *Lerner v. Casey*, 357 U. S. 468 (1958). It is not determinative that the interrogation here was by a federal body rather than a state one, as it was in those

cases. Globe had been ordered by his employer as well as by California's law to appear and answer questions before the federal Subcommittee. These mandates made no reference to Fifth Amendment privileges. If Globe had simply refused, without more, to answer the Subcommittee's questions, we think that under the principles of *Beilan* and *Lerner*, California could certainly have discharged him. The fact that he chose to place his refusal on a Fifth Amendment claim puts the matter in no different posture, for as in *Lerner*, *supra*, at 477, California did not employ that claim as the basis for drawing an inference of guilt. Nor do we think that this discharge is vitiated by any deterrent effect that California's law might have had on *Globe's* exercise of his federal claim of privilege. *The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security.* See *Garner* and *Adler*, *supra*. Likewise, we cannot say as a matter of due process that the State's choice of securing such information by means of testimony before a federal body can be denied. Finally, we do not believe that California's grounds for discharge constituted an arbitrary classification. See *Lerner*, *id.*, at 478. We conclude that the order of the County Board was not invalid under the Due Process Clause of the Fourteenth Amendment." (Emphasis added.)

The Supreme Court of Pennsylvania considered the *Nelson* case and distinguished it on the ground that California had provided by statute that the employee must answer a Congressional Committee, and was therefore securing information for itself by utilizing testimony before a federal body.

In thus attempting to distinguish the *Nelson* case from the *Slochower* case, the Pennsylvania Supreme Court failed to recognize that the present case is governed by *Nelson*, not by *Slochower*. As in the case of *Nelson*, the Board of

Public Education in the present cases did not dismiss the respondent teachers on the basis of any inference from their Fifth Amendment claim, but on the ground that their refusal to answer was incompetency, regardless of the fact that respondent coupled his refusal with a plea against self-incrimination.

It was the position of the petitioner that the plea of privilege did not prevent dismissal for refusing to answer. The Pennsylvania Supreme Court, however, in holding that dismissal for refusal to answer can not be distinguished from dismissal for making the plea has decided contrary to this Court's decisions in *Lerner v. Casey* and *Nelson et al. v. County of Los Angeles.*

The absence of a specific statute in Pennsylvania directing teachers or other public employees to answer such question of a Congressional Committee does not adequately distinguish the present cases from *Nelson et al. v. County of Los Angeles.* It is patent that the Board of Public Education, as the employer of the respondents, was vitally interested in the information which the Congressional Committee was seeking of the respondents, and which was important to the employees' fitness. See: *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Adler v. Board of Education*, 342 U. S. 485 (1952). No specific statute is required to authorize the public employer to obtain information as to a teacher's former Communist connections.

> *Beilan v. Board of Public Education, School District of Philadelphia*, 357 U. S. 399 (1958).

At the time respondents appeared before the Subcommittee, it was investigating the extent of Communist infiltration in the Philadelphia public school system.

It is further submitted that there was no adequate independent non-federal ground for the decision of the court below.

The Court below in the present cases held that these teachers were dismissed for disloyalty, and that the Board equated the plea of the Fifth Amendment with disloyalty. This Court considered the same contention in *Beilan*.

This Court stated in *Beilan:*

> "The Board based its dismissal upon petitioner's refusal to answer any inquiry about his relevant activities—not upon those activities themselves. It took care to charge petitioner with incompetency, and not with disloyalty. It found him insubordinate and lacking in frankness and candor—it made no finding as to his loyalty." (357 U. S. 405-406)

The only difference between *Beilan* and the present cases is that Beilan refused to answer his Superintendent, and these teachers refused to answer a congressional committee.

The Pennsylvania Supreme Court also stated in its opinion that the teachers' pleas of the Fifth Amendment did not prove their incompetency within the meaning of the Public School Code. While this may appear superficially to be a non-federal basis for decision, it is apparent on closer examination that this conclusion was not predicated on state law and was not an independent basis of decision. It was inextricably interwoven with the federal constitutional questions which the court below considered at length, and expressly stated that its decision was based on the petitioner's violation of the teacher's constitutional rights. In such cases this Court has clear jurisdiction.

State Tax Commission v. Van Cott, 306 U. S. 511 (1939);

Abie State Bank v. Bryan, 282 U. S. 765, 773 (1931);

Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U. S. 157, 164 (1917).

The court's conclusion relating to incompetency rested upon the same interpretation of constitutional law which it made in considering the due process questions raised under the Fourteenth Amendment. The Court assumed contrary to this court's decisions in *Lerner v. Casey* and *Nelson, et al. v. County of Los Angeles*, that the refusal to answer and the plea of privilege are inseparable, that dismissal was for the plea of privilege rather than for refusal to answer and that this must always be the case where the refusal to answer is predicated on the plea.

It is further submitted that the privileges and immunities clause of the Fourteenth Amendment was not a ground on which to reverse the dismissals. The privileges and immunities clause has never been interpreted by this Court to protect a state employee in his state employment, because such state employment is not one of the privileges or immunities of national citizenship.

So far as the Fifth Amendment privilege is concerned, the School District did not curtail or abridge it in any way by dismissing the respondents from their employment. If the order of the Board dismissing the respondents from their employment was not contrary to the due process clause, it did not violate the privileges and immunities clause. See: *Hamilton et al. v. Regents of the University of California*, 293 U. S. 245 (1934).

The question of the application of the privileges and immunities clause to the present cases, in any event, is a substantial federal constitutional question which merits review by this court, together with the other substantial federal questions in the cases.

The questions are of substantial importance to the states, their cities, school districts and other subdivisions. The decision of the court below unduly restricts the authority of a public employer over its employees and prevents an employer from taking disciplinary action against employees who refuse to answer questions of legislative committees, whether such questions related to Communist

connections or to any other matter pertinent to the employer's interest and the employees' fitness. The decision, if unreviewed and unreversed, applies the Fourteenth Amendment in a way in which this court has not heretofore approved its application, with drastic effects on the powers of the states and their subdivisions.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

C. Brewster Rhoads,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Attorney for Petitioner.

Edward B. Soken,
21st St. and the Parkway,
Philadelphia, Pa.

Sidney L. Wickenhaver,
Montgomery, McCracken, Walker
& Rhoads,
Of Counsel.

Sept. 28, 1960.

APPENDIX A.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

Constitution, Amendment XIV, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution, Amendment V.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Pennsylvania Public School Code of 1949, March 10, P. L. 30, art. XI, § 1122, as amended.

> "Causes for termination of contract.
>
> The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, . . . persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe: . . ."

APPENDIX B.

OPINIONS BELOW.

Commonwealth of Pennsylvania
DEPARTMENT OF PUBLIC INSTRUCTION
Harrisburg

Appeal of Angelina Intille, a Professional Employe, from a Decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania	In the Office of the Superintendent of Public Instruction, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania No. 98

January 17, 1955

Opinion

Angelina Intille has appealed her dismissal from employment as a professional employe in the School District of the City of Philadelphia. In accordance with Section 1122 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the Board of Public Education of Philadelphia charged Mrs. Intille with incompetency and persistent and wilful violation of the school laws of the Commonwealth.

For the reasons specified in our Opinion in the case of Solomon Haas, Opinion No. 90, dated November 18, 1954, we hold that the action of the Board of Public Education of the School District of the City of Philadelphia in dismissing Angelina Intille, the appellant, was proper. A copy of the Opinion in the case of Solomon Haas, referred to above, is attached hereto and made a part hereof.

Findings of Fact

1. Appellant is a professional employe in the School District of the City of Philadelphia.

2. On February 16, 1954, appellant was called before the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities, and asked certain questions dealing with her loyalty to the Government of the United States. Appellant refused to answer these questions, invoking the Fifth Amendment to the Federal Constitution as the basis of her refusal.

3. On February 19, 1954, appellant was rated "unsatisfactory" as a professional employe, by Dr. Louis P Hoyer, Superintendent of Schools of Philadelphia.

4. Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia, sent appellant a detailed letter informing her that she was rated "unsatisfactory" as a result of her refusal to answer questions presented by the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities.

5. On March 9, 1954, the Board of Public Education preferred charges against the appellant on the grounds of incompetency and persistent and wilful violation of the school laws of this Commonwealth, and after sending her a statement of charges, conducted a hearing in the matter on April 30, 1954.

6. As a result of such hearing the Board of Public Education determined on May 28, 1954, that the appellant be dismissed.

7. From the action of the Board of Public Education an appeal was filed with the Superintendent of Public Instruction on June 4, 1954.

8. No additional testimony was taken before the Superintendent of Public Instruction.

Conclusions of Law

1. The notice given to appellant of her unsatisfactory rating was a sufficient compliance with the law:

2. Neither Section 1123 nor Section 1125 of the Public School Code of 1949, as amended, dealing with the matter of rating professional employes, requires that a copy of the actual rating card used in the rating of a professional employe, be forwarded to the professional employe when the rating is made. The official rating card of the Department of Public Instruction is but a guide in determining the rating of a professional employe. The forwarding of a detailed written statement of the unsatisfactory rating was a sufficient compliance with the law.

3. The rating of professional employes, which is the right, the discretion and the duty of superintendents of schools, is not limited to classroom performance.

4. A superintendent of schools is within his legal authority in asking proper questions of professional employes in the employ of his district, which questions relate to the fitness of such employes to continue to serve as teachers in the employ of the school district.

5. The "Pennsylvania Loyalty Act," the Act of December 22, 1951, P. L. 1726, in no way insulates a professional employe from being asked questions as to his loyalty, and said Act is not involved in the present proceeding.

6. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such employe refuses to answer proper questions relating to his loyalty asked of him by the superintendent of schools.

7. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "incompetency."

8. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "persistent and wilful violation of the school laws of this Commonwealth."

9. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such professional employe refuses to answer questions put to him by a sub-committee of the House of Representatives of the Congress of the United States and invokes the Fifth Amendment to the Federal Constitution on the ground that truthful answers thereto would tend to incriminate him.

Adjudication and Order

And, now, this 17th day of January, 1955, after hearing and argument and after reviewing all the testimony filed or taken in the hearing, the appeal of Angelina Intille from a decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania, alleging that the Board of Public Education improperly dismissed her as a professional employe, is hereby dismissed and the action of the Board of Public Education is affirmed.

By Francis B. Haas,
Superintendent of Public Instruction.

Commonwealth of Pennsylvania

Department of Public Instruction

Harrisburg

Appeal of Thomas Deacon, a Professional Employe, from a Decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania	In the Office of the Superintendent of Public Instruction, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania No. 114

January 17, 1955

Opinion

Thomas Deacon has appealed his dismissal from employment as a professional employe in the School District of the City of Philadelphia. In accordance with Section 1122 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the Board of Public Education of Philadelphia charged Mr. Deacon with incompetency and persistent and wilful violation of the school laws of the Commonwealth.

For the reasons specified in our Opinion in the case of Solomon Haas, (Opinion No. 90, dated November 18, 1954) we hold that the action of the Board of Public Education of the School District of the City of Philadelphia in dismissing Thomas Deacon, the appellant, was proper. A copy of the Opinion in the case of Solomon Haas, referred to above, is attached hereto and made a part hereof.

This appeal is therefore dismissed and the following order entered.

Findings of Fact

1. Appellant is a professional employe in the School District of the City of Philadelphia.

2. On November 18, 1953, appellant was called before the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities, and asked certain questions dealing with his loyalty to the Government of the United States. Appellant refused to answer these questions, invoking the Fifth Amendment to the Federal Constitution as the basis of his refusal.

3. On November 20, 1953, appellant was rated "unsatisfactory" as a professional employe by Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia.

4. On November 24, 1953, Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia, sent appellant a detailed letter informing him that he was rated "unsatisfactory" as a result of his refusal to answer questions presented by the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities.

5. On November 25, 1953, the Board of Public Education preferred charges against the appellant on the grounds of incompetency and persistent and wilful violation of the school laws of this Commonwealth, and after sending him a statement of charges, conducted a hearing in the matter on May 21, 1954.

6. As a result of such hearing the Board of Public Education determined on June 29, 1954, that the appellant be dismissed.

7. From the action of the Board of Public Education an appeal was filed with the Superintendent of Public Instruction on July 22, 1954.

8. No additional testimony was taken before the Superintendent of Public Instruction.

Conclusions of Law

1. The notice given to appellant of his unsatisfactory rating was a sufficient compliance with the law.

2. Neither Section 1123 nor Section 1125 of the Public School Code of 1949, as amended, dealing with the matter of rating professional employes, requires that a copy of the actual rating card used in the rating of a professional employe, be forwarded to the professional employe when the rating is made. The official rating card of the Department of Public Instruction is but a guide in determining the rating of a professional employe. The forwarding of a detailed written statement of the unsatisfactory rating was a sufficient compliance with the law.

3. The rating of professional employes, which is the right, the discretion and the duty of superintendents of schools, is not limited to classroom performance.

4. A superintendent of schools is within his legal authority in asking proper questions of professional employes in the employ of his district, which questions relate to the fitness of such employes to continue to serve as teachers in the employ of the school district.

5. The "Pennsylvania Loyalty Act," the Act of December 22, 1951, P. L. 1726, in no way insulates a professional employe from being asked questions as to his loyalty, and said Act is not involved in the present proceeding.

6. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such employe refuses to answer proper questions relating to his loyalty asked of him by the superintendent of schools.

7. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "incompetency."

8. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "persistent and wilful violation of the school laws of this Commonwealth."

2. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such professional employe refuses to answer questions put to him by a sub-committee of the House of Representatives of the Congress of the United States and invokes the Fifth Amendment to the Federal Constitution on the ground that truthful answers thereto would tend to incriminate him.

Adjudication and Order

And now, this 17th day of January, 1955, after hearing and argument and after reviewing all the testimony filed or taken in the hearing, the appeal of Thomas Deacon from a decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania, alleging that the Board of Public Education improperly dismissed him as a professional employe, is hereby dismissed and the action of the Board of Public Education is affirmed.

By Frances B. Haas,
Superintendent of Public Instruction.

Commonwealth of Pennsylvania
DEPARTMENT OF PUBLIC INSTRUCTION
Harrisburg

Appeal of Sadie T. Atkinson, a Professional Employe, from a Decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania	In the Office of the Superintendent of Public Instruction, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania No. 100

January 17, 1955

Opinion

Sadie T. Atkinson has appealed her dismissal from employment as a professional employe in the School District of the City of Philadelphia. In accordance with Section 1122 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the Board of Public Education of Philadelphia charged Mrs. Atkinson with incompetency and persistent and wilful violation of the school laws of the Commonwealth.

For the reasons specified in our Opinion in the case of Solomon Haas, Opinion No. 90, dated November 18, 1954, we hold that the action of the Board of Public Education of the School District of the City of Philadelphia in dismissing Sadie T. Atkinson, the appellant, was proper. A copy of the Opinion in the case of Solomon Haas, referred to above, is attached hereto and made a part hereof.

This appeal is therefore dismissed and the following order entered.

FINDINGS OF FACT

1. Appellant is a professional employe in the School District of the City of Philadelphia.

2. On November 17, 1953, appellant was called before the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities, and asked certain questions dealing with her loyalty to the Government of the United States. Appellant refused to answer these questions, invoking the Fifth Amendment to the Federal Constitution as the basis of her refusal.

3. On November 20, 1953, appellant was rated "unsatisfactory" as a professional employe, by Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia.

4. On November 24, 1953, Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia, sent appellant a detailed letter informing her that she was rated "unsatisfactory" as a result of her refusal to answer questions presented by the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities.

5. On November 25, 1953, the Board of Public Education preferred charges against the appellant on the grounds of incompetency and persistent and wilful violation of the school laws of this Commonwealth, and after sending her a statement of charges, conducted a hearing in the matter on April 9, 1954.

6. As a result of such hearing the Board of Public Education determined on May 10, 1954, that the appellant be dismissed.

7. From the action of the Board of Public Education an appeal was filed with the Superintendent of Public Instruction on June 9, 1954.

8. No additional testimony was taken before the Superintendent of Public Instruction.

Conclusions of Law

1. The notice given to appellant of her unsatisfactory rating was a sufficient compliance with the law.

2. Neither Section 1123 nor Section 1125 of the Public School Code of 1949, as amended, dealing with the matter of rating professional employes, requires that a copy of the actual rating card used in the rating of a professional employe, be forwarded to the professional employe when the rating is made. The official rating card of the Department of Public Instruction is but a guide in determining the rating of a professional employe. The forwarding of a detailed written statement of the unsatisfactory rating was a sufficient compliance with the law.

3. The rating of professional employes, which is the right, the discretion and the duty of superintendents of schools, is not limited to classroom performance.

4. A superintendent of schools is within his legal authority in asking proper questions of professional employes in the employ of his district, which questions relate to the fitness of such employes to continue to serve as teachers in the employ of the school district.

5. The "Pennsylvania Loyalty Act," the Act of December 22, 1951, P. L. 1726, in no way insulates a professional employe from being asked questions as to his loyalty, and said Act is not involved in the present proceeding.

6. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such employe refuses to answer proper questions relating to his loyalty asked of him by the superintendent of schools.

7. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "incompetency."

8. The refusal to answer, referred to in conclusion No. 6 herein, constitutes "persistent and wilful violation of the school laws of this Commonwealth."

9. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such professional employe refuses to answer questions put to him by a sub-committee of the House of Representatives of the Congress of the United States and invokes the Fifth Amendment to the Federal Constitution on the ground that truthful answers thereto would tend to incriminate him.

ADJUDICATION AND ORDER

And now, this 17th day of January, 1955, after hearing and argument and after reviewing all the testimony filed or taken in the hearing, the appeal of Sadie T. Atkinson from a decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania, alleging that the Board of Public Education improperly dismissed her as a professional employe, is hereby dismissed and the action of the Board of Public Education is affirmed.

By FRANCIS B. HAAS,
Superintendent of Public Instruction.

Exhibit A.

Commonwealth of Pennsylvania
DEPARTMENT OF PUBLIC INSTRUCTION
Harrisburg

Appeal of Solomon Haas, a Professional Employe, from a Decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania	In the Office of the Superintendent of Public Instruction, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania No. 90

November 18, 1954

OPINION

Solomon Haas has appealed his dismissal from employment as a professional employe in the City of Philadelphia. In accordance with Section 1122 of the Public School Code of 1949, the Act of March 10, 1949, P. L. 30, the Board of Public Education of Philadelphia (hereinafter called the Board), charged Haas with incompetency and persistent and wilful violation of the school laws of the Commonwealth.

The record reveals that on June 26, 1952, appellant, during an interview with Dr. Louis P. Hoyer, Superintendent of Schools, refused to answer certain questions as to his loyalty. Haas stated that he wished to consult counsel. At a second meeting, on October 14, 1952, appellant, having consulted counsel, again refused to answer questions relating to loyalty. He had taken the Loyalty Oath,[1] and his position was that this oath "took care of everything before that time." Appellant further stated that "he did not propose to have here what happened in Germany."

[1] The Act of December 22, 1951, P. L. 1726, 65 P. S. Section 211 et seq.

Thereafter, in November, 1953, a sub-committee of the House Committee on Un-American Activities met in Philadelphia for the purpose of investigating communist activities in that city. Appellant, in response to a subpoena, appeared before the sub-committee on November 18, 1953. He stated that at that time he was not a member of the Communist Party. However, when asked whether he had ever been a member, he refused to answer on the ground of the Fifth Amendment to the Constitution of the United States. The appellant was asked other questions by counsel for the sub-committee, relating to membership in the party and various communist front organizations, as well at attendance at meetings and picket lines. In each instance, Haas invoked the Fifth Amendment.

On the basis of Haas' refusal to answer questions relating to loyalty asked by Dr. Hoyer on June 26, 1952 and October 14, 1952, and his refusal to answer questions dealing with loyalty before the sub-committee upon recommendation by Dr. Hoyer, the Board, on November 25, 1953, preferred the charges against Haas to which reference has heretofore been made. Appellant received a statement of the charges, and on December 19, 1953, he was given a hearing before the Board. Thereafter, the Board found that the charges had been proved and, on January 7, 1954, Solomon Haas was dismissed. This appeal followed.

The important question presented for our determination is whether appellant's refusals, on the three occasions mentioned, to answer questions relating to loyalty, constitute incompetency and persistent and wilful violation of the school laws. This, of course, involves a consideration of the authority of Dr. Hoyer to ask the questions, and the effect of invoking the Fifth Amendment before a sub-committee of the Congress of the United States.

It was settled in Pennsylvania by the case of *Albert Appeal*, 372 Pa. 13 (1952), that a communist or any person who advocates or participates in subversive doctrines cannot teach in the public school system. Mr. Chief Justice

Stern, speaking for the Supreme Court, there said, at page 19:

> ". . . In short, it is essential, in order to protect our children from treacherous influences, that persons who advocate or participate in subversive doctrines should not be employed, or if employed should not be retained, as teachers in our public schools, and any teacher dismissed for such a reason cannot properly claim that any constitutional or legal right is thereby violated."

See also, the Act of December 21, 1951, P. L. 1712, 18 P. S. Section 3811.

To carry out the mandate of Article 10, Section 1 of the Pennsylvania Constitution that there be maintained a "thorough and efficient system of public schools," the appointment of superintendents is provided for in the public school system. The duties of such individuals include the determination of the fitness of the professional employes. See Section 1123 of the Public School Code of 1949, as amended by the Act of August 10, 1951, P. L. 1157, Section 1, 24 P. S. Section 11-1123 (P. P.).

As soon as Dr. Hoyer, as District Superintendent, came into possession of information concerning the loyalty of appellant, it was in our judgment his right, indeed, his solemn duty to inquire of appellant as to the truth or falsity of this information. Because of the important nature of this information, Dr. Hoyer chose to make the necessary inquiry himself. If appellant had cooperated and it was determined the information was false, it would then have been Dr. Hoyer's duty to protect this teacher from false accusation. Appellant, however, refused to cooperate and instead became insubordinate in that "he did not propose to have here what happened in Germany."

The fact that appellant took the Loyalty Oath in no way insulates him from inquiry relative to past conduct. Dr. Hoyer apparently possessed information relating to past

subversive activity or association with subversive organizations by appellant. Assuming that such information was true, and assuming further that appellant's participation in subversive activities continued at least until the day of the oath, it is obvious that the inquiry as to past activity and association is relevant to determine if the activity or association has stopped and, if so, when and under what circumstances.

The Supreme Court of the United States, in a similar situation, has said:

> "We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. . . ." (Garner v. Board of Public Works of Los Angeles, 341 U. S. 716 (1951))

It has been held repeatedly that the term "incompetency," as used in the Public School Code, is not limited to classroom performance alone: *Horosko v. Mt. Pleasant Twp. School District et al.*, 335 Pa. 369; *Brown's Case*, 151 Pa. Superior Ct. 522; and *West Mahanoy Twp. School Dist. v. Kelly*, 156 Pa. Superior Ct. 601.

It is our opinion that the settled contempt of Solomon Haas for the authority of the Superintendent of Schools seriously reflects upon his qualifications as a teacher. We fully agree with the sentiments of Dr. Hoyer contained in the testimony before the Board of Public Education as a reason for the unsatisfactory rating given to Haas:

> "The question of competency of a teacher has many implications. Of course, there is the question of

his technical skill in handling the work in the classroom. But there are a great many other matters that have to deal with personality, character, that are as important in some respects, I think even more important, than technical skill on the part of a teacher.

"I felt that in this instance Mr. Haas did not show the frankness, the candor, the kind of intellectual honesty that I think a teacher is bound to show in connection with his work. This was true on both occasions when he came into my office.

"The influence of a teacher in the classroom is perhaps greatest through the force of his example, through the kind of person that he appears to the children to be. And when we are dealing in an area that is as extensive as the area of a classroom, these matters assume tremendous importance. I therefore feel that a teacher who cannot deal with his professional superiors on a basis of candor and frankness has a very serious defect in his qualifications as a teacher and I, therefore, consider him incompetent to be a teacher."

Since the questions which Dr. Hoyer desired to ask appellant related to his loyalty, his position is in accord with that adopted by the Supreme Court of the United States in the case of *Adler v. Board of Education of the City of New York*, 342 U. S. 485, wherein it was said at page 493:

". . . A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, can-

not be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate."

Under the circumstances, we find that Haas' conduct before the Superintendent on two occasions constitutes incompetency within the meaning of the Public School Code. Cf., *Ambridge Borough School District v. Snyder*, 346 Pa. 103; and *Ganaposki's Case*, 332 Pa. 103.

Appellant has raised the question whether he was given notice of the unsatisfactory rating in compliance with the Tenure Law, in that he did not receive a copy of the rating card.

We interpret Sections 1123 and 1125 of Public School Code of 1949 to require only that a copy of the rating or results of the computation be sent to the employe. A copy of the rating card need not be forwarded to the employe. In this particular case, the detailed letter which Dr. Hoyer sent to the employe, setting forth his reasons for the unsatisfactory rating, was much more informative than would have been a copy of the rating card itself. Since the purpose of the law is obviously to inform the teacher that an unsatisfactory rating has been placed on record against him, the Board of Public Education, in this case, has complied with the rating procedure prescribed by the Code. See *Mulhollen Appeal*, 155 Pa. Superior Ct. 587.

We also sustain the finding of the Board of Public Education that Haas' conduct constituted persistent and wilful violation of the school laws of the Commonwealth.

Appellant clearly indicated that under no cir
would he answer the questions put to him by
either then, or at any future time. Since we fir
that the school laws imposed a duty upon appe
swer these questions, it follows that his repeate
do so constitutes persistent and wilful violation.

Even if the interviews with Dr. Hoyer had
place, we believe another and most compelling re
for sustaining the dismissal of this employe—his
answer questions propounded by a duly consti
committee of the Congress of the United States.

The astonishing argument is made in appell
that he "by his own violation did not flaunt his c
fore the public." The committee is blamed for
plight in that it called for his testimony in pub
and thus caused appellant to refuse to answer.
argument is preposterous. The simple facts ar
pellant was asked by a lawful body, questions b
sworn testimony which, if true, seriously reflect
pellant's responsibilities, not only as a teacher
citizen. Appellant refused to answer these que
cause a truthful answer thereto might tend to in
him. At the hearing before the Board he reaffi
position.

No one disputes appellant's right under th
States Constitution to invoke the Fifth Amend
refuse to testify as to possible communistic a
However, when a public school teacher pulls down
of immunity, in our judgment his employer woul
remiss in his obligation to American children
parents if he did not at once remove such teacher
classroom. We are not swayed by arguments that
tion should attach to the teacher who so deports
By all the concepts of logic and reason the teache
that he has done something for which he might
cuted criminally. We repeat, this appellant admitt

hearing before the Board that a truthful an committee's question would incriminate him.

It is fundamental that while a person has tional right to refuse to testify, such person do a right to public employment as a school teacher or in any other capacity. An exercise of the protect a person from criminal prosecution, but prevent the revocation of a privilege by the S exercise of its police power to protect the school lution and thereby to defend its own existence *Board of Education of the City of New York*, s

The courts have frequently considered the the relationship of the Fifth Amendment to pun ment. Justice Holmes once said on this point:

> ". . . The petitioner may have a co right to talk politics, but he has no constitu to be a policeman. There are few employ hire in which the servant does not agree to s constitutional rights of free speech as well ness by the implied terms of his contrac (McAuliffe v. Mayor of the City of New H Mass. 216, 29 N. E. 517-518).

In *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 24 the following very pertinent observations are m

> "The testimony shows many outrages done by the police, and yet, when these men w

"Mr. Rhoads: Would the stenographer repeat that question conversation from you on that, Mr. Haus

"The question was repeated by the stenographer as follows: when you took the benefit of the Fifth Amendment on Novem before the House Un-American Activities Committee in Philad that if you answered truthfully the questions which were presen that Committee, that your answers would incriminate you?

"The Witness. The answer is yes. However, I should lik following: First, here is a very serious question as to the use Amendment, even though I used the Fifth Amendment. There to free association. I don't recall exactly what the amendment to the ability to read different types of material as to make up a broad picture of a situation which is necessary as a basis the First Amendment . . ." (N. T. 82).

on the witness stand and interrogated as
knew, they invariably sheltered under th
ding self-incrimination; and, when the q
whether the witness should or should not
to answer was certified to the chancellors,
were always protected by the ruling. J
ruling to be correct, the conclusion which
been drawn as to the innocence of the
justified. The principle under discussion
evidence, to protect the witness from crim
tion or public exposure to shame becaus
testimony. It is a rule of necessity, beyo
should not be extended. Its use should
sidered as affording the witness a certifi
character. Here were police officers being
as 'to existence of crimes they were paid t
possible; if not, to expose and punish afte
yet they one and all refused to answer 'u
of counsel.' Suppose a secret murder ha
mitted, and the police on that beat, when
it, should say, 'I decline to answer for fea
inating myself.' This, under the rule inv
protect the witness from answering; but
would it justify his retention on the roll of
What would be thought of those who left
safety in his hands longer than it would req
charge him? Suppose a bank had been r
the bookkeeper, the teller, and cashier, wh
gated, should say, 'I decline to answer un
of counsel.' What would be thought of a
directors who would afterwards leave the b
hands of such men? This is precisely the
here. Peace officers, whose duty it was to p
expose crime, when called on to do so, shelte
the rule against self-incrimination; and yet
still wear the official uniform, still draw sala

the public purse, and this is made consent of those who are the appo their silence."

The same general proposition of l lic employe to answer questions was e preme Court of Pennsylvania, as it a in the case of *Sonday v. Philadelphia* Atl. 245, wherein a policeman had fai tions. The Court there said at page 6:

". . . It was essential in the his duties that he should comport in such manner that no act of wron itself to him, to the end that thos him should feel for him that respec fidence and obedience. As such an tion he should have been keen to evil doing attached itself to him an made, reflecting upon his honesty they were met with denial and ans delinquencies. He should have suspicion. Instead of so doing, w gravest nature were brought again inquest of the county, he answered not to establish his freedom from planation, but in a manner calcul complicity in crime, and, when su perior on specific charges before t by the law with the duty of inquirin swered not at all. This in itself wa ing an officer."

In a very recent case, *Curran v. S Boston*, 129 N. E. 2d 772, the Supreme C setts sustained the dismissal of a tea identical with those here presented. I page 774:

". . . We do not believe that dismissal of a teacher for pleading self incrimination before a Senate committee when asked about affiliation with the Communist Party can be held by the courts to be arbitrary, irrational, unreasonable, or irrelevant to the task of the school committee. The responsibility for determining grounds for dismissal rests primarily with the school committee and not with the court. Refusal to testify does not prove guilt and no inference of guilt can be drawn from it in a criminal case. In re Opinion of the Justices, 300 Mass. 620, 15 N. E. 2d 662. But the question here is not one of guilt or innocence. **It is a question of administration by a public board in the public interest.** Neither the school committee nor the court exists in a vacuum. Neither can profess ignorance of the currents of opinion which sway great masses of the people. It cannot be doubted that multitudes of people in this community regard with abhorrence the Communist Party and communism as that term is generally understood. It is not for this court to say why this is so or whether this feeling has gone too far or not far enough. It is sufficient for us that the feeling exists. Nothing the court can do or say will prevent the public from drawing its own inferences from refusals to testify. It is apparent that a school teacher has extensive and peculiar opportunity to impress his attitude and views upon pupils in his charge. It was the petitioner's statutory duty to impress upon them 'love of their country.'[3] . . . Yet some of the questions which the petitioner declined to answer bore directly upon the recruiting of students for communism. The school committee could find that a great many parents and others would be seriously disturbed if the petitioner were allowed to continue teaching, and that this would undermine public confidence and react unfavorably upon the

[3] Cf., Sections 1511 and 1515 of the Public School Code of 1949, 24 P. S. Sections 15-1511 and 15-1515.

school system. Considering the position of the petitioner entirely apart from any question of fault on his part and as if he had merely suffered some misfortune, such as a terribly disfiguring personal injury, the best interests of the schools are paramount, and we cannot say that the school committee exceeded its powers." (Emphasis supplied).

Much has been written concerning the lack of civic responsibility on the part of a teacher who invokes the Fifth Amendment. See Hook, "The Fifth Amendment: A Moral Issue," New York Times Magazine, November 1, 1953; Reuter, "The School Administrator and Subversive Activities," Columbia University, New York, 1951, but we will confine our comments by quoting from the case of *Public Education Assn. v. Board of Education*, 88 D. & C. 512 (Philadelphia County), which involved a teacher who was suspended for the same reasons as appellant. The court there said at pages 513-515:

"Plaintiff was suspended on the ground that she had shown a lack of fitness to be a teacher in displaying conduct unbecoming her professional status in that she had failed to answer questions which in good conscience she should have been willing to answer candidly as to any affiliation with subversive organizations.

"Since this ground is not enumerated in the section of the statute set forth above, plaintiff concludes that the suspension is improper and therefore merits the intervention of this court.

"But the act does not lend itself to the tortured construction advanced by plaintiff. Because a teacher passes certain qualifying grades, she is not automatically so secure in her position that if she commits some act detrimental to society or to the children placed in her charge, the superintendent of schools is powerless

less to dismiss the teacher pending a final hearing by the board of education.

. . . . . .

"Certainly the refusal of plaintiff to answer questions of a duly constituted committee of our Congress is a dreadful example for a teacher to set for her pupils. Whether plaintiff is a subversive or not, such wrongful conduct before a committee of the highest legislative branch of our Republic, can only foster in the impressionable children under her tutelage, a settled contempt and arrogance for our country and its lawmakers."

Appellant's conduct before the sub-committee of the House of Representatives of the Congress of the United States Investigating Un-American Activities, fully justifies the finding of incompetency by the Board of Public Education.

For the foregoing reasons we hold that the action of the Board of Public Education of the School District of the City of Philadelphia, in dismissing appellant was proper. This appeal is therefore dismissed and the following order entered.

Findings of Fact

1. Appellant is a professional employe in the School District of the City of Philadelphia.

2. Appellant on June 26, 1952, was called for a personal interview by Dr. Louis P. Hoyer, Superintendent of Schools, and informed that Doctor Hoyer wished to ask her some questions having an important bearing on her loyalty. At that time, appellant stated that he refused to answer the questions and wished to seek the advice of legal counsel.

3. On October 14, 1952, appellant was again called before Doctor Hoyer for questioning and stated that upon advice of legal counsel he refused to answer Doctor Hoyer's questions.

4. On November 18, 1953, appellant was called before the subcommittee of the House of Representatives of the Congress of the United States Investigating Un American Activities, and asked certain questions dealing with his loyalty to the Government of the United States. Appellant refused to answer these questions, invoking the Fifth Amendment to the Federal Constitution as the basis of his refusal.

5. On November 20, 1953, appellant was rated "unsatisfactory" as a professional employe, by Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia.

6. On November 24, 1953, Dr. Louis P. Hoyer, Superintendent of Schools of Philadelphia, sent appellant a detailed letter informing him that he was rated "unsatisfactory" as a result of his refusal to answer questions presented by him and by the subcommittee of the House of Representatives of the Congress of the United States Investigating Un American Activities.

7. On November 25, 1953, the Board of Public Education preferred charges against the appellant on the grounds of incompetency and persistent and wilful violation of the School Laws of this Commonwealth, and after sending him a statement of charges, conducted a hearing in the matter on December 19, 1953.

8. As a result of such hearing the Board of Public Education determined on January 7, 1954, that the appellant be dismissed.

9. From the action of the Board of Public Education an appeal was filed with the Superintendent of Public Instruction on February 4, 1954.

10. No additional testimony was taken before the Superintendent of Public Instruction.

Conclusions of Law

1. The notice given to appellant of his unsatisfactory rating was a sufficient compliance with the law.

2. Neither Section 1123 nor Section 1125 of the Public School Code of 1949, as amended, dealing with the matter of rating professional employes, requires that a copy of the actual rating card used in the rating of a professional employe, be forwarded to the professional employe when the rating is made. The official rating card of the Department of Public Instruction is but a guide in determining the rating of a professional employe. The forwarding of a detailed written statement of the unsatisfactory rating was a sufficient compliance with the law.

3. The rating of professional employes, which is the right, the discretion and the duty of superintendents of schools, is not limited to classroom performance.

4. A superintendent of schools is within his legal authority in asking proper questions of professional employes in the employ of his district, which questions relate to the fitness of such employes to continue to serve as teachers in the employ of the school district.

5. The "Pennsylvania Loyalty Act," the Act of December 22, 1951, P. L. 1726, in no way insulates a professional employe from being asked questions as to his loyalty, and said Act is not involved in the present proceeding.

6. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such employe refuses to answer proper questions relating to his loyalty asked of him by the superintendent of schools.

7. The refusal to answer referred to in conclusion No. 6 hereof, constitutes "incompetency."

8. The refusal to answer referred to in conclusion No. 6 herein, constitutes "persistent and wilful violation of the school laws of this Commonwealth."

9. A superintendent of schools is justified in rating a professional employe "unsatisfactory" when such professional employe refuses to answer questions put to him by a sub-committee of the House of Representatives of the Congress of the United States and invokes the Fifth Amendment to the Federal Constitution on the ground that truthful answers thereto would tend to incriminate him.

ADJUDICATION AND ORDER

And now, this eighteenth day of November, 1954, after hearing and argument and after reviewing all the testimony filed or taken in the hearing, the appeal of Solomon Haas from a decision of the Board of Public Education of the School District of the City of Philadelphia, Pennsylvania, alleging that the Board of Public Education improperly dismissed him as a professional employe, is hereby dismissed and the action of the Board of Public Education is affirmed.

By FRANCIS B. HAAS,
Superintendent of Public Instruction.

Board of Public Education School District of Philadelphia *v.* Angelina Intille	C. P. No. 5 December Term, 1954 No. 8410

OPINION.

Reimel, *J.*

This is an appeal from an order of the Superintendent of Public Instruction of the Commonwealth of Pennsylvania which affirmed appellant's dismissal from her position as a school teacher by the Board of Public Education of the School District of Philadelphia.

Appellant was appointed a teacher in the Philadelphia public schools in 1948. At the time of her dismissal in 1954 she was a teacher at the Comly School, an elementary school.

On February 16, 1954, appellant, pursuant to subpoena, appeared before a subcommittee of the Committee on Un-American Activities of the United States House of Representatives, together with counsel. She refused to answer questions asked of her by said Committee concerning subversive activities and associations connected with the Communist Party, unless the Congressional Committee first agreed to terms which she proposed. These terms would have restricted the scope of the Committee's inquiries drastically. The Committee refused to abide by her demands whereupon appellant refused to answer and invoked the privilege against self-incrimination granted by the Fifth Amendment to our Federal Constitution.

On February 19, 1954, Dr. Louis P. Hoyer, Superintendent of Public Schools in Philadelphia, suspended appellant pending a hearing before the Board of Education. A written charge of incompetency was preferred under the Public School Code of 1949, 24 P. S. Section 11-1122. This charge was based upon appellant's refusal to answer the

questions asked of her by the House Subcommittee and her invocation of the Fifth Amendment as her reason for refusal.

A public hearing was held before the Board of Education on April 30, 1954. The transcript of the Committee hearing was introduced into evidence. Dr. Hoyer stated that he had brought charges of incompetency against appellant and had rated her unsatisfactory on the basis of her lack of civic responsibility in refusing to cooperate with the Congressional Committee, the poor judgment which he felt that she had exercised in so conducting herself, and her lack of appreciation and ideals with regard to her responsibilities to the government of the country.

Appellant, who was represented by counsel, was present at the hearing but did not testify. Appellant offered evidence to justify her refusal to answer questions and evidence of her reputation as a teacher and her reputation for civic responsibility and good judgment. Such reputation evidence was excluded because the charge of incompetency was based solely on her appearance before the Congressional Committee.

The Board of Education by a vote of 11 to 3 held that the charge in incompetency was sustained and dismissed appellant.

On administrative appeal, Dr. Francis B. Haas, Superintendent of Public Instruction of the Commonwealth of Pennsylvania, affirmed the dismissal. This appeal followed.

A review of the record reveals that the Superintendent of Public Instruction in his referral to Opinion No. 90 in the case of Solomon Haas incorporated extraneous Findings of Fact and Conclusions of Law in the present opinion. Therefore, Findings of Fact No. 5 relating to persistent and wilful violation of the school laws of this Commonwealth should be stricken. Likewise, Conclusions of Law Nos. 2, 4, 6, 7 and 8 should also be stricken.

Appellant contends that the case of Slochower v. Board of Higher Education of New York City, 350 U. S. 551 is

controlling and that her dismissal is a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. Slochower was summarily dismissed for invoking the Fifth Amendment before a Federal Committee. In setting aside the dismissal the Court pointed out that the dismissal of Slochower under the statute was automatic, with no right to charges, notice, hearing or opportunity to explain. Slochower's dismissal violated due process because it was summary and without inquiry.

In the instant case the School Code authorizes the dismissal of a teacher for incompetency and prescribes at length the procedure with respect thereto. Under its provisions appellee was notified in writing of the charges against her. She received a hearing before the Board of Education and exercised the right given her to appeal to the State Superintendent of Public Instruction and thereafter to this Court. Her dismissal was not without due process of law.

"Incompetency" as used in the Public School Code is not limited to classroom performance alone: Horosko v. Mt. Pleasant Twp. School District et al., 335 Pa. 369. "Incompetency" as a cause for dismissal is to be given a broad meaning. It may be based on a refusal to respond to a pertinent inquiry as to one's fitness to be a teacher. Loyalty is a proper and pertinent subject of inquiry: Board of Public Education, School District of Philadelphia v. Beilan, 386 Pa. 82, affirmed 357 U. S. 399.

A municipal employer may inquire of its employees as to matters that may prove relevant to their fitness and suitability for public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment: Garner v. Board of Public Works, 341 U. S. 716.

A teacher works in a sensitive area in a classroom. There she shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern for it must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society cannot be doubted: Adler v. Board of Education, 342 U. S. 485. It is the duty of the Superintendent under the School Code to maintain a teaching staff that is competent, and to weed out those who are professionally unfit. This is a continuing process and he has the power as well as the duty, whenever the facts indicate the need, to inquire into and re-evaluate the fitness of a teacher: Board of Public Education School District of Philadelphia v. Beilan, supra.

To state that a person does not have a constitutional right to government employment is only to say that she must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities: Slochower v. Board of Higher Education of New York City, supra. It is clear that one has no right to work for the State school system on her own terms: Public Workers v. Mitchell, 330 U. S. 75.

The dismissal of a teacher for pleading Self Incrimination before a Congressional Committee is not arbitrary, irrational, unreasonable, or irrelevant to the task of the school board. The responsibility for determining grounds for dismissal rests primarily with the board and not with the Court. Refusal to testify does not prove guilt and no inference of guilt can be drawn from it: Slochower v. Board of Higher Education of New York City, supra. But the issue here is not one of guilt or innocence. It is a question of administration by a public board in the public interest. A school teacher has the opportunity to impress her attitude and views upon pupils in her charge. It was the appellant's statutory duty to impress upon them love of and

loyalty to their country. Yet some of the questions app
lant refused to answer bore directly upon these subjec
The school board could find that if appellant is allowed
continue teaching that this would undermine public co
fidence and react unfavorably upon the school syste
Faxon v. School Committee of Boston, 331 Mass. 531.

Certainly the refusal of appellant to answer questio
of a duly constituted Committee of our Congress is a dre
ful example for a teacher to set for her pupils. Wheth
appellant is a subversive or not, such conduct before a co
mittee of the highest legislative branch of our governme
can only foster in the impressionable children under h
tutelage a settled contempt and arrogance for our court
and its lawmakers: Intille v. Hoyer, 88 D. & C. 512.

The School Code expressly provides that incompeten
shall be cause for dismissal and the evidence establish
that appellant rendered herself incompetent as a member
the school organization.

For the above reasons, the order of the State Superi
tendent of Public Instruction affirming appellant's di
missal by the Board of Public Education is affirmed and t
Court enters the following:

ORDER.

And Now, to wit, this day of 1959, t
appeal of Angelina Intille from an order of the Sta
Superintendent of Public Instruction affirming appellant
dismissal by the Board of Public Education is dismisse
that the order of the State Superintendent of Public I
struction is affirmed and appellant is hereby discharged.

By THE COURT.

.....

Judge Weinrott took no part in the consideration
decision of this case.

BOARD OF PUBLIC EDUCATION SCHOOL DISTRICT OF PHILADELPHIA	C. P. No. 1
v.	December Term, 1954
THOMAS DEACON	No. 8411

Before: HAGAN, *P. J.*
GRIFFITHS, *J.*
CHUDOFF, *J.*

OPINION.

PER CURIAM—October 16, 1959

This matter was before us upon an appeal by defendant from an order of the Superintendent of Public Instruction of the Commonwealth, affirming the action of the Philadelphia Board of Public Education in terminating the contract of employment of defendant as a teacher in the Philadelphia Public School System. After argument and submission of briefs, we dismissed the appeal and affirmed the order of the Superintendent of Public Instruction. Thereafter, an appeal was filed by defendant to the Supreme Court of Pennsylvania, and we are writing this opinion in compliance with Rule 43 of that Court.

Defendant was appointed a teacher in the Philadelphia Public School System in 1929; and he was suspended on November 23, 1953, at which time he had been employed as a counselor at the Sulzberger Junior High School. The events leading up to defendant's suspension and eventual dismissal as a teacher were these:

On November 18, 1953, defendant, pursuant to subpoena, appeared before the Committee on Un-American Activities of the House of Representatives of the United States Congress, then holding hearings in Philadelphia. He gave the Committee his name, address, and a resume of his education and employment as a teacher and counselor in the Philadelphia School System. He also testified that he had

taken the Pennsylvania Loyalty Oath in April of 1952 and that he was not then (as of the date of the hearing) a member of the Communist Party. He refused, however, to answer various questions propounded to him by the Committee relative to his prior Communist affiliations, and he asserted as the basis for his refusal the privilege against self incrimination contained in the Fifth Amendment to the United States Constitution.

On November 20, 1953, defendant was rated "unsatisfactory" as a professional employee by Dr. Louis P. Hoyer, Philadelphia Superintendent of Schools; and on November 24, 1953, Dr. Hoyer sent to defendant a letter informing him that he had been rated "unsatisfactory" as a result of his refusal to answer questions presented to him by the Congressional Committee. Charges were then preferred against him on the grounds of incompetency and persistent and wilful violation of the school laws of this Commonwealth; and a hearing on these charges was held on May 21, 1954, by the Philadelphia Board of Education. As a result of the hearing, the Board determined that the charges had been sustained; and on June 29, 1954, defendant was dismissed from his position by the Board. Defendant then appealed to the Superintendent of Public Instruction of the Commonwealth; and on January 17, 1955, the Superintendent affirmed the dismissal of defendant. The matter then came before this court on an appeal from the decision of the Superintendent of Public Instruction, affirming the order of the Board of Public Education.

The decision of the Superintendent of Public Instruction made reference to an alleged failure on the part of defendant to answer questions propounded to him by the Philadelphia Superintendent of Schools and concluded, inter alia, that appellant was guilty of persistent and wilful violation of the school laws of this Commonwealth. It is conceded by counsel for the School Board that the decision of the Superintendent of Public Instruction as to this charge cannot be sustained, because it was admitted that defend-

ant had answered fully and honestly all of the questions propounded to him at the hearing before the Board, including those questions which he had refused to answer before the Congressional Committee.

It was therefore agreed by counsel for defendant and the Board of Public Education that the sole question which was before us on this appeal was whether or not defendant's refusal to answer questions concerning his alleged past Communist affiliations, by the invocation of the privilege against self-incrimination during his apearance before the Committee on Un-American Activities of the House of Representatives of the Congress of the United States, amounted to "incompetency" as that term is employed in Section 1122 of the Public School Code of March 10, 1949, P. L. 30; 24 PS § 11-1122.

The Pennsylvania Supreme Court in the case of Board of Public Education School District of Philadelphia v. Beilan, 386 Pa. 82, 89, made the following statements with respect to the meaning of the term "incompetency" as employed in the School Code:

> "We have held that incompetency, as a cause for dismissal is to be given a broad meaning. In *Horosko v. Mount Pleasant Township School District et al.*, 335 Pa. 369, 6 A. 2d 866, Mr. Justice Linn, speaking for the Court, at pps. 374-375 said: 'The term "incompetency" has a "common and approved usage". The context does not limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. Common and approved usage gives a much wider meaning. For example, in 31 C. J., with reference to a number of supporting decisions, it is defined: "A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; lack of ability, legal qualifications, or fitness to discharge the required duty." In Black's Law Dictionary (3rd edition) page 945, and in Bouvier's Law Dictionary (3rd revision), p. 1528, it is defined as "Lack of ability or

> fitness to discharge the required duty." Cases construing the word to the same effect are found in Words and Phrases, 1st series, page 3510, and 2nd series, page 1013. Webster's New International Dictionary defines it as "want of physical, intellectual, or moral ability; insufficiency; inadequacy; specif., want of legal qualifications or fitness." Funk & Wagnalls Standard Dictionary defines it as "General lack of capacity of fitness, or lack of the special qualities required for a particular purpose." "

The United States Supreme Court affirmed the decision of the Pennsylvania Supreme Court in the Beilan case: 357 U. S. 399, and in so doing quoted with approval the foregoing definition of "incompetency" at page 407.

In the case of Horosko v. Mt. Pleasant School District, 335 Pa. 369, 371, it was stated:

> "If the fact be that she [a teacher] 'now commands neither the respect nor the good will of the community' and if the record shows that effect to be the result of her conduct within the clause quoted, it will be conclusive evidence of incompetency. It has always been the recognized duty of the teacher to conduct himself in such way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance * * *."

The United States Supreme Court, in affirming the decision of the Pennsylvania Supreme Court in the Beilan case, also quoted with approval, at pages 406-407, the foregoing language from the Horosko case.

The opinions of the Pennsylvania Supreme Court and the United States Supreme Court in the *Beilan* case clearly establish that a teacher may properly be dismissed on the

ground of *incompetency* as a result of refusal to answer questions concerning past Communist activities. Thus, the Pennsylvania Supreme Court stated at pages 89-90:

> "Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, whether the inquiry concerns loyalty or any other proper subject of inquiry."

It is true that in the Beilan case the dismissal was based upon a refusal to answer questions concerning past Communist activities propounded by the school authorities, whereas in the instant case the dismissal was based upon the refusal to answer similar questions propounded by a Congressional Investigating Committee. This difference, however, does not render the ground for the dismissal of Mr. Deacon in the instant case an improper one. To the contrary, we believe that the refusal to answer a pertinent inquiry relative to fitness to teach made before a Congressional Investigating Committee is an even clearer example of incompetency than the same refusal made before school authorities. As was pointed out both in the Horosko case and in the opinion of the United States Supreme Court in the Beilan case, a teacher who does not conduct himself in such a way as to command the respect and good will of the community is incompetent. It would seem clear that a teacher who fails to answer pertinent questions before a Congressional Investigating Committee is much more likely to lose the respect and good will of the community than a teacher who refused to answer the same questions in the privacy of the office of the school authorities.

Appellant's contention that he was improperly dismissed is based upon the holding of the United States Supreme Court in the case of Slochower v. The Board of Higher Education of New York City, 350 U. S. 551. When that decision is analyzed, however, it is apparent that it is distinguishable from the present case. Slochower was dis-

missed from his teaching position in New York City without a hearing, pursuant to Section 903 of the Charter of the City of New York, which provided that whenever an employee of the City utilized the privilege against self-incrimination to avoid answering a question relating to his official conduct, his employment should automatically terminate. The United States Supreme Court held that Slochower's summary dismissal was violative of due process of law since Section 903 was self-executing and therefore operated to discharge every employee who invoked the privilege against self-incrimination.

The difference between the Slochower case and the instant case is that Slochower was summarily dismissed because he had invoked the Fifth Amendment; while Deacon, on the other hand, was dismissed because he had refused to answer questions concerning his prior Communist affiliation, a refusal which the Board of Education held had rendered him incompetent to fulfill the important and sensitive position of teaching and counseling children in their duties and responsibilities as citizens of a democracy. It was Deacon's refusal to answer, and not the fact that the refusal was based upon the Fifth Amendment, which caused his dismissal.

The conclusions we have reached and the reasons therefor are the same as those of President Judge Milner as expressed in a very able opinion in the case of Board of Public Education School District of Philadelphia v. Sadie T. Atkinson, C. P. No. 3, December Term, 1954, No. 8217. The legal issue which was before Judge Milner in the Atkinson case is identical with that before us in the instant case. The reasons and conclusions of Judge Milner in the cited case are lucid, convincing and compelling; and they are adopted by us in support of our dismissal of the appeal of the defendant from the order of the Superintendent of Public Instruction.

IN THE COURT OF COMMON PLEAS NO. 3 IN AND FOR THE COUNTY OF PHILADELPHIA (FIRST JUDICIAL DISTRICT OF PENNSYLVANIA)

BOARD OF PUBLIC EDUCATION SCHOOL DISTRICT OF PHILADELPHIA	December Term 1954
v.	No. 8315
SADIE T. ATKINSON	

FRANKLIN POUL, ESQ., for Appellant

EDWARD B. SOKEN, ESQ.,
SIDNEY L. WICKENHAVER, ESQ. and
C. BREWSTER RHOADS, ESQ.,
for Appellee

Before MILNER, *P. J.*
WATERS, *J.*

OPINION SUR APPEAL FROM SUPERINTENDENT OF PUBLIC INSTRUCTION.

MILNER, *P. J.*,

July 29th, 1959.

This is an appeal from the order of the Superintendent of Public Instruction of the commonwealth affirming the action of the Board of Public Education in terminating the contract of employment of a professional employee. Sadie T. Atkinson, the appellant, was employed as an elementary teacher at the Barton School, in the School District of Philadelphia. Charges were preferred against her and a hearing was held before the Board of Public Education pursuant to the provisions of the Public School Code, Act of March 10,

1949, P. L. 30, section 1127, 24 P. S. 11-1127. After the hearing, which was held on April 9, 1954, the appellant was dismissed from her position on May 10, 1954. On appeal to the Superintendent of Public Instruction, the superintendent, in an adjudication and order filed January 17, 1955, affirmed the dismissal. This appeal followed. Pursuant to section 1132 of the code, 24 P. S. 11-1132, we consider the matter on the record as presented to us, there being no request for a hearing de novo.

The charge preferred against the appellant was incompetency. The evidence presented at the hearing before the Board of Public Education was that on November 17, 1953, the appellant had been called before a sub-committee of the House of Representatives of the Congress of the United States investigating Un-American activities, and, when asked certain questions dealing with her loyalty to the government of the United States, she refused to answer, invoking the Fifth Amendment to the federal Constitution as the basis of her refusal; that on November 20, 1953, the Superintendent of Schools of Philadelphia rated the appellant "unsatisfactory" as a professional employee; that on November 24, 1953, the Superintendent of Schools notified the appellant that she had been rated "unsatisfactory" as a result of her refusal to answer questions put to her by the congressional sub-committee. The appellant presented no evidence at the hearing. Her counsel moved for dismissal of the charges on the grounds that they did not allege conduct constituting incompetency under the Public School Code, and that they violated the federal Constitutional by imposing a penalty on the claim of a federally guaranteed privilege.

The record shows that the appellant, when called before the congressional sub-committee, at a hearing held in Philadelphia on November 17, 1953, gave her name and address, stated that she was a first-grade teacher in the Philadelphia school system, by which she had been employed for ten years, and gave a brief resume of her educational back-

ground. She was then asked the following questions by counsel for the sub-committee, and gave the answers here set forth:

"Q. Mrs. Atkinson, have you ever been a member of the Communist Party at any time?

A. I decline to answer on the grounds of possible self-incrimination, based on the Fifth Amendment of the Constitution.

Q. This committee has sworn testimony, Mrs. Atkinson, by witnesses before the committee, under oath, that you have been a member of the United People's Club of the Communist Party, is that correct?

A. I decline to answer on the same grounds.

Q. We also have sworn testimony that your Communist membership book in the year 1945 was Number 86905. Did you have such a Communist Party membership book?

A. I invoke the privileges of the Fifth Amendment on the same grounds."

No other questions were asked of the appellant at the sub-committee hearing. In the hearing before the Board of Education at which the appellant was present and a stenographic transcript of the record before the sub-committee of the House of Representatives investigating Un-American activities, which included the above questions to the appellant and her answers thereto, was introduced in evidence and read in the open hearing, the appellant made no denial of its correctness. In fact, throughout the hearing and in the briefs of her counsel the appellant conceded the correctness of the report of the sub-committee as given above. The Superintendent of Schools testified before the board and explained the basis of his conclusion that the appellant's refusal to answer the sub-committee's questions marked her as incompetent and therefore unfit to continue as a public-school teacher.

Section 1122 of the Public School Code, 24 P. S. 11-1122, as amended, lists the valid causes for which a professional employee's contract may be terminated as immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, and persistent and wilful violation of the school laws. The specific charge in this case was the second of the foregoing, i.e., incompetency.

We note that the opinion of the Superintendent of Public Instruction states that the appellant was charged also with persistent and wilful violation of the school laws of the commonwealth. This appears to be incorrect, as it is the first reference that we find in the record to such a charge. We therefore disregard the charge of persistent and wilful violation of the school laws and confine our consideration to the charge of incompetency, which, if sustained, is sufficient to justify the dismissal.

The issue is two-fold. First: Did the conduct of the appellant in refusing to answer the questions put to her by the committee warrant a finding that she was incompetent? Second: Even if the school authorities were warranted in so finding under the provisions of the Public School Code and the Pennsylvania decisions, were such a finding and the appellant's dismissal precluded by the fact that in refusing to answer the committee's questions she was exercising a right guaranteed her by the federal Constitution? The appellant filed eighteen exceptions to the adjudication of the Superintendent of Public Instruction, but at the argument before the court the foregoing two issues were the only ones touched upon, and appellant's brief deals solely with the federal question involved. We shall, however, notice each of the exceptions filed, for the purpose of disposing of them formally.

Exception No. 1 is without merit. The testimony of the superintendent of schools was competent, to show the action taken by him in respect of the rating given the appellant and to explain his ratiocination in the circumstances and his rea-

sons for reaching the conclusion that he reached on the facts before him. This exception is dismissed.

Exception No. 2 is dismissed: The action of the Board of Public Education was not based on a refusal to answer questions pertaining to religious or political beliefs but on a refusal to answer questions pertaining to activities and associations having to do with what has been judicially declared to be a subversive conspiracy.

Exception No. 3 is based on the erroneous theory that the exclusive procedure available to the board was under the Pennsylvania Loyalty Act. The decision of the Supreme Court in *Board of Education v. Beilan*, 386 Pa. 82 (1956), aff'd 357 U. S. 399 (1958) requires that this exception be dismissed.

Exception No. 6 complains of lack of specificity in the charge preferred against the appellant. Holding as we do that the dismissal was warranted if either of the charges of incompetency or violation of the school laws was supported, and that the evidence supports the finding of incompetency, this exception has no weight and is dismissed.

Exception No. 8 has no merit and is dismissed. The rating of unsatisfactory by the superintendent and the bringing of charges followed forthwith after the action of the appellant which gave rise to them. The appellant's previous rating of satisfactory, before the events which we are considering, was not conclusive.

Exceptions Nos. 10 and 11 must be sustained not necessarily for the reasons given therein, but because no charge was preferred against the appellant of persistent and wilful violation of the school laws of the commonwealth.

Exception No. 13 is not supported by the record. The Superintendent's adjudication made no finding that the appellant's invoking of the Fifth Amendment privilege was evidence of guilt of any crime suggested by the questions asked of her. This exception is dismissed.

Exception No. 17 must be sustained. There is no evidence in the record to support the Superintendent's fourth,

sixth, seventh, and eighth conclusions of law, which refer to refusal to answer questions put by the superintendent of schools. The brief of counsel for the Board of Public Education explains that these conclusions were included in the Superintendent's adjudication by inadvertence. We regard them as harmless surplusage, if the evidence otherwise supports the charge.

Exception No. 18, is dismissed. The record before us includes a certification by the secretary and business manager of the board that the motion for dismissal of the appellant was adopted on May 10, 1954, by a vote of eleven to one. This is a compliance with the requirement of section 1129 of the code, 24 P. S. 11-1129, that the vote be by two-thirds of all the members of the board. There is no requirement in the statute that all those voting must have been present at the hearing. Moreover, the record shows that of the eleven who voted for the motion of dismissal, ten were present at the hearing, though one arrived late.

Of the remaining exceptions, the ninth, twelfth, 14th and 15th have to do with the appellant's contention that, first, the finding of incompetency and, second, the dismissals were unconstitutional because the action on her part which brought them about was one taken by her in the exercise of a federally guaranteed privilege. This contention we shall discuss later. Presently we shall address ourselves to the propriety of the board's finding of incompetency on the evidence before it, which is the subject of the appellant's fourth, fifth, seventh, and 16th exceptions.

The term "incompetency" as used in the Public School Code of Pennsylvania is not confined to the classroom activities of a teacher or to the teacher's educational background or mastery of the teaching art. A schoolteacher's influence upon her pupils is not limited to what she says and does in the schoolroom, and a teacher's right to teach cannot depend solely upon her conduct in the school. *Kaplan v. School District of Philadelphia*, 178 Pa. Superior Ct. 88 (1955), aff'd 388 Pa. 213 (1957). A teacher's incom-

petency may be determined on the basis of her actions entirely outside the classrooms and outside school hours, where her conduct tends to bring her into public disrepute and to forfeit the respect and confidence of the community. *Horosko v. Mt. Pleasant Twp. School District*, 335 Pa. 369 (1939). See also *Brown's Case*, 151 Pa. Superior Ct. 522 (1943); *West Mahanoy Twp. School District v. Kello*, 156 Pa. Superior Ct. 601 (1944). The refusal of a teacher to answer questions put to him by the school superintendent touching the teacher's past connections with the Communist Party will justify a finding of incompetency and consequent dismissal. *Board of Public Education v. Beilan*, supra. In the Beilan case, as in this case, the allegation of incompetency was based solely on the refusal to answer questions. Beilan refused to answer questions put by his superintendent as well as questions asked by a congressional committee, but, speaking for the majority of the Pennsylvania Supreme Court, Mr. Justice Chidsey found it unnecessary to consider the refusal to answer the congressional committee. The dismissal was upheld solely on Beilan's refusal to give answers to questions put to him by the school superintendent, in interviews which, as Mr. Justice Burton pointed out in the United States Supreme Court's affirming opinion, 357 U. S. 399, "were given no publicity and were attended only by petitioner, his superintendent and the Assistant Solicitor of the Board." In our view, the refusal to answer before the congressional sub-committee was far more serious, both in Beilan's case and in the case of this appellant, attended as it was with publicity which would bring it to the attention of those whose children could be vitally affected.

It was not necessary to draw inferences of guilt from Beilan's refusal to answer. The same is true in Mrs. Atkinson's case. She was not branded incompetent because she was or had been a Communist. She was regarded by her employing board and by her superintendent as unfit to continue as a teacher because of her lack of frankness,

candor, and cooperation; because, in a time of national stress and danger, perhaps the gravest danger that has ever confronted the nation, she took refuge behind a cloak of secrecy.

It seems necessary at the very outset to define our attitude towards Communism, and what we think is the attitude of the Pennsylvania public. We are against it. We regard others who are against it as our friends and those who favor it as our enemies. Those who will not commit themselves we regard with natural suspicion. While, as Mr. Justice Bell stated in his dissenting opinion in the Beilan case, many influential Americans fail to appreciate the menace of Communism, it is nevertheless true that our Supreme Court has taken judicial notice of the fact that the Communist Party is a subversive organization which conspires to teach and to advocate the overthrow of the government of the United States by force and violence. *Appeal of Albert*, 372 Pa. 13 (1953). There have been many other indications of judicial awareness of the gravity of the Communist threat. It has been held that the term "Communist" is slanderous per se. *Solosko v. Paxton*, 383 Pa. 419 (1956). But to our minds the greatest danger stems not from open advocacy of Communist doctrine. With that we can deal on even terms as long as our press remains free and our churches and schools are allowed to inculcate in our youth the principles and doctrines on which this nation was founded and has prospered. The real menace of Communism lies not in its substance but in its method, its secret, slinking, insidious infiltration, in the guise of innocent benevolence, into key positions where most harm can be done, in the schools, in departments of the government, in the entertainment world, and elsewhere.

It is not within the province of the courts to say who shall and who shall not be employed as teachers in the public schools. That function the legislature has entrusted to the constituted school authorities, in its wisdom circumscribing

the power of those authorities by the Public School Code as well for the welfare of public and pupils in the influence to which they may be exposed as for the protection of professional employees in their tenure of office. Our part is to see that the authorities do not abuse the power entrusted to them or exercise it arbitrarily or capriciously. Recognizing the seriousness of the danger to our institutions from the creeping, boring, undermining threat of Communism, we cannot say that a school board is bound to keep on its roster a teacher who, when asked to say which side she is on, refuses to stand up and be counted. To the contrary, we are convinced that the school authorities would be remiss if they did not weed out from the teaching staff all who exhibit the evasiveness, the lack of candor, the peculiar traits of character and personality which prevent some people from openly aligning themselves against the underground forces of subversion, traits which not only arouse natural suspicion in the minds of those entrusted with the administration of our system of education, but bring the teacher who exhibits them into public disrepute as one not possessing the qualifications looked for in a person charged with the instruction of our youth.

We are not alone in this conviction. The courts of other states, from California to Massachusetts, have spoken to like effect. California, in *Board of Education v. Wilkinson*, 270 P. 2d 82, 86 (1954), has said, "In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of that government, 'to bite the hand that feeds it.' The men and women of America who pay their salaries have a right to know whether or not any of their employees are communists." And similarly Chief Justice Qua, of Massachu-

setts, in *Faxon v. School Committee of Boston*, 120 N. E. 2d 772, 774 (1954): "The school committee could find that a great many parents and others would be seriously disturbed if the petitioner were allowed to continue teaching, and that this would undermine public confidence and react unfavorably upon the school system. Considering the position of the petitioner entirely apart from any question of fault on his part and as if he had merely suffered some misfortune, such as a terribly disfiguring personal injury, the best interests of the schools are paramount, and we cannot say that the school committee exceeded its powers."

These and many other pronouncements of the state courts put into different words the thoughtful language of Mr. Justice Minton in *Adler v. Board of Education of the City of New York*, 342 U. S. 485, 493 (1952): "A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and person with whom they associate."

The public as well as the school authorities have the right to be informed of a public employee's associations and conduct, past and present. This is especially true of one employed in the delicate and sensitive task of a school

teacher. A teacher who withholds vital information in this regard, whether in response to private interrogation by the constituted authorities or in response to inquiries made by public bodies, forfeits all right to consideration for the position, and if already in service forfeits all right to be continued therein. By her very secretiveness, she brands herself as incompetent.

Appellant's fourth, fifth, seventh and 16th exceptions are therefore dismissed.

Having found the appellant incompetent, in their opinion, what were the Board of Public Education to do? They chose to terminate her contract and dismiss her from her employment as a public-school teacher. Were they acting properly in so doing, or were they violating her constitutional rights because the act which made her incompetent was the exercise on her part of a privilege guaranteed her by the Constitution? In other words, must the school authorities retain the services of a teacher whom they have found incompetent because to dismiss her would attach a penalty to the exercise of her right to refuse to answer because of her fear of self-incrimination? This is the subject of appellant's ninth, twelfth, 14th, and 15th exceptions and is, we think, the real thrust of her argument. She places her reliance on *Slochower v. The Board of Higher Education of New York City*, 350 U. S. 551 (1956), which we shall now examine.

The Slochower case must be read in the light of the earlier Beilan decision and of *Lerner v. Casey*, 357 U. S. 468 (1958), which was announced at the same time as Beilan. Each case has its own peculiar features. Slochower was dismissed from his teaching post in New York without a hearing, pursuant to section 903 of the Charter of the City of New York, which provided that whenever an employee of the city utilized the privilege against self-incrimination to avoid answering a question relating to his official conduct his term or tenure of office or employment should terminate and such office or employment should be vacant, and he

should not be eligible to election or appointment to any office or employment under the city or any agency. Under New York law a teacher was entitled to tenure and could not be discharged except for cause and after notice, hearing, and appeal.' The Court of Appeals of New York interpreted section 903 to mean that the assertion of the privilege against self-incrimination was equivalent to a resignation. *Damiman v. Board of Education*, 306 N. Y. 532, 538, 119 N. E. 2d 373, 377 (1954). The United States Supreme Court held that Slochower's summary dismissal was violative of due process of law: no sinister meaning may be imputed to the exercise of a person's right under the Fifth Amendment, and since section 903 operated automatically to discharge every employee who invoked the Fifth Amendment, the city's action was therefore a conclusive presumption of guilt.

Lerner was dismissed from his job as a subway conductor in the New York City transit system. He had invoked the Fifth Amendment when called before the Commissioner of Investigation of the City of New York and refused to answer questions regarding communist affiliation. The United States Supreme Court, in affirming the dismissal, pointed out that the New York Court of Appeals had held that Lerner "had been discharged neither because of any inference of communist party membership which was drawn from the exercise of the Fifth Amendment privilege nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his 'reliability' by his refusal to answer a relevant question put by his employer, a doubt which the court held justifiable quite independently of appellant's reasons for his silence. In effect, the administrative action was interpreted to rest solely on the refusal to respond."

Beilan, a Philadelphia teacher, was rated incompetent by the superintendent of schools and was dismissed after a hearing before the Board of Public Education in which it appeared that he had refused to answer questions regarding communist affiliations in an interview with the superintend-

ent and before a congressional committee. The Pennsylvania Supreme Court upheld the dismissal based on the teacher's refusal to answer the superintendent and found it unnecessary to determine the effect of his refusal to answer the committee. The United States Supreme Court affirmed, stating, "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the superintendent's questions."

The Slochower case is thus distinguishable from Lerner and Beilan and from the instant case not only in the respect that Slochower was denied due process because he was dismissed without notice and hearing but, more substantively, in the respect of the fundamental reason for the dismissal. Mrs. Atkinson, like Lerner and Beilin, was discharged not for invoking the Fifth Amendment, but for refusing to answer pertinent questions. Her silence, her secrecy, her evasiveness, made her incompetent to teach, in the opinion of her employer. "We cannot draw a distinction based on where or to whom the refusal to answer is expressed, provided the inquiry is a pertinent one and made in the course of a legitimate investigation. Beilan's refusal to answer his superintendent, Lerner's refusal to answer the Commissioner, Mrs. Atkinson's refusal to answer the congressional committee, all had the same effect of raising doubt and suspicion of the employee's competency and reliability. Indeed, as we remarked earlier in this opinion, we should regard the refusal to answer the congressional committee in public as more serious than the refusal to answer the employer in private. There can be no doubt that the questions asked of Mrs. Atkinson were within the legitimate scope of the committee's investigation, even though touching her school teaching activities (*Barenblatt v. United States*, June 8, 1959, October Term 1958, No. 35, U. S. Supreme Court); and we cannot fail to recognize the publicity attendant on such proceedings and its effect on the reputation and stand-

ing in the community of one who publicly declines to co-operate in the investigation. In short, the appellant having been found incompetent because of her refusal to answer, quite apart from the reasons prompting her refusal, no question of constitutional privilege was involved in the termination of her employment. The remaining exceptions not already touched upon are therefore dismissed.

ORDER

And Now, to wit, this 29th day of July 1959, the appeal of Sadie T. Akinson from the order of the State Superintendent of Public Instruction affirming appellant's dismissal by the Board of Public Education is dismissed, and the order of the State Superintendent of Public Instruction is affirmed.

By THE COURT,
Milner, *P. J.*

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BOARD OF EDUCATION SCHOOL DISTRICT OF PHILADELPHIA *v.* ANGELINA INTILLE, THOMAS DEACON, and SADIE T. ATKINSON.	Nos. 331, 332, 352 January Term, 1959. No. 331—Appeal of Angelina Intille No. 332—Appeal of Thomas Deacon No. 352—Appeal of Sadie T. Atkinson Appeals from Orders of Courts of Common Pleas of Philadelphia County: Appeal No. 331 (C. P. 5, at No. 8410, December Term, 1954); Appeal No. 332 (C. P. 4, at No. 8411, December Term, 1954); Appeal No. 352 (C. P. 3, at No. 8315, December Term, 1954).

OPINION OF THE COURT

(Filed: June 30, 1960)

JONES, *C. J.*

The three appellants (Angelina Intille, Thomas Deacon and Sadie T. Atkinson) were teachers in the public schools of Philadelphia until the Spring of 1954 when they were dismissed by the Board of Public Education of the School District on a charge of "incompetency", preferred by Dr. Louis P. Hoyer, Superintendent of the Philadelphia public

schools. In each case, the dismissal was based *solely* on the teacher's refusal to answer certain questions propounded by a Sub-committee (also known as the Velde Committee) of the Un-American Activities Committee of the House of Representatives[1] concerning the witness' alleged membership in and association with the Communist Party. In refusing to testify in such regard, each of the appellants expressly relied upon the privilege against self-incrimination guaranteed by the Fifth Amendment of the Federal Constitution.

All of the proceedings below, which resulted in the final orders of dismissal, now before us, were conducted separately throughout but, since the basic legal questions raised (both Federal and State), are the same in all three appeals, they will be disposed of in this one opinion.

The appellants contend that their dismissals, as teachers, (1) violated the due process clause of the Fourteenth Amendment, and (2) abridged their privilege against self-incrimination under the Fifth Amendment in further violation of the Fourteenth Amendment and of Article VI of the Federal Constitution.

There is also an additional question raised by the Board's contention that the appellant's plea of privilege against self-incrimination under the Fifth Amendment constituted incompetency within the intent of Pennsylvania's Public School Code of 1949.

As teachers under contract prescribed by the Public School Code of 1949, the appellants were entitled to tenure as professional employees and, by virtue of the same statutory authority, were subject to dismissal from their teaching positions *only* for cause upon notice, hearing and right of appeal.[2] One of the specified causes for removal

1. The term Committee wherever it appears in this opinion shall be taken to mean the above identified Sub-committee of the Un-American Activities Committee of the House of Representatives of the United States.

2. See Sections 1121, 1122, 1127, 1131 and 1132, 24 PS §§ 11-1121, 11-1122, 11-1127, 11-1131 and 11-1132 of the Public School Code of 1949 (Act of March 10, 1949, P. L. 30, as amended).

as prescribed by the School Code, is incompetency, which is the charge upon which Superintendent Hoyer suspended these teachers and recommended their dismissal to the Board of Education.[5] The Superintendent based his finding of incompetency solely upon the fact that the appellants had refused to answer questions asked them by the Congressional Committee in reliance on their pleas of privilege under the Fifth Amendment against self-incrimination.

Subsequent testimony by the Superintendent, as well as the Board's charges based upon his recommendations of dismissal, ascribed as the basis for the finding of incompetency that the appellants had, upon an allowed plea of privilege, failed to *cooperate* with the Committee when they appeared before it pursuant to subpoena. It is, of course, not possible to separate refusal to answer from exercise of the privilege. Obviously, it is the latter which affords the basis for the refusal to answer. Nor was there statute of this State nor rule promulgated by the Commonwealth's Department of Public Instruction or the Philadelphia Board of Education which assumed to deal in any way with a professional employee's invocation of the privilege against self-incrimination under the Fifth Amendment. That the refusal to answer on the ground of the plea was, in truth, the exclusive basis for the Superintendent's conclusion that the appellants were incompetent, should be plain to any one, even the most querulous.

Within *three* days of the appearance of Mrs. Intille and Mrs. Atkinson before the Committee, and their refusal to testify, (*two* days in the case of Mr. Deacon), Superin-

5. Section 1122 provides: "The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employee: * * *". [Formerly, Section 1122 had also specified, as a cause for the termination of a teacher's contract, "advocation of or participating in un-American or subversive doctrines." This ground was expressly repealed, however, by Section 16 of the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726 (Pechan Act) which, in addition to prescribing a loyalty oath required of public employees, including teachers, specifies the grounds relating to loyalty for which their employment can be terminated.]

tendent Hoyer undertook to re-rate them as teachers and gave each a rating of "unsatisfactory" for the first time in the professional career of any one of them as a Philadelphia Public School teacher.[4] In re-rating the appellants the Superintendent used an official rating card prepared and supplied by the State's Department of Public Instruction. Section 1123 of the School Code. The card contained a category of subjects according to which the qualifications of a teacher were to be judged. The Superintendent arrived at his conclusion that the appellants were incompetent by checking on the respective rating card for each of them three items listed, viz., (1) civic responsibility, (2) judgment, and (3) appreciation and ideals, in respect whereof the Superintendent then found each of them lacking because of their plea of the Fifth Amendment in refusing to answer some of the questions propounded by the Committee. In this way, the Superintendent, by equating the appellants' exercise of their constitutional privilege with poor judgment, deficiency of ideals and lack of civic responsibility, found them to be incompetent and forthwith suspended each of them and recommended their dismissal to the Board of Education *on the ground of incompetency*. At no time did any of the appellants refuse to answer any question asked them by their administrative superior.

The Board of Education, acting on the Superintendent's recommendations of dismissal, promptly charged each of the appellants with incompetency and fixed a separate time for a hearing thereon for each.[5] Mrs. Atkinson, Mrs. Intille and Mr. Deacon attended their respective hearings before the Board. Counsel for the Board offered in evidence the respective transcript of the hearing before the Committee at which the particular appellant had appeared

4. Mrs. Intille had been a teacher in the Philadelphia Public School system for six years, Mrs. Atkinson for ten and Mr. Deacon for upwards of twenty-four years.

5. Mrs. Atkinson's hearing before the Board of Public Education on the charge of incompetency was held on April 9, 1954; Mrs. Intille's, on April 30, 1954; and Mr. Deacon's, on May 21, 1954.

and had refused to answer.[6] Dr. Hoyer testified, at each of these hearings before the Board as to his re-rating of the appellants, whereon he based his charge of incompetency which, in each instance, was bottomed on the teacher's refusal to answer questions of the Committee, as shown by the relevant transcript in evidence.

Neither Mrs. Atkinson nor Mrs. Intille were asked any questions by the Board or by the Superintendent at their hearings and did not testify; but Mrs. Intille, through counsel, offered to present evidence of her good reputation as a teacher and for civic responsibility and sound judgment. The offer was rejected by the Board and the evidence excluded "because the charge against her was based

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6. The transcript of the hearing before the Committee on November 17, 1953, at which Mrs. Atkinson appeared, disclosed that she had given the Committee her name, address and a resume of her schooling and her employment record as a teacher. When asked whether she had ever been a member of the Communist Party and whether she had a certain membership Communist Book in 1945, she pleaded her privilege under the Fifth Amendment against self-incrimination and declined to answer.

The transcript of the hearing before the Committee on February 16, 1954, at which Mrs. Intille appeared, disclosed that she had given the Committee her name, address and a resume of her educational background and her employment record as a teacher. She testified under oath that in 1952 she had taken the Pennsylvania Loyalty Oath. (Note: As prescribed by the Act of December 22, 1951, P. L. 1726, 65 PS § 211, etc., the oath disavows the affiant's advocacy of, or knowing membership in any organization that advocates, the violent overthrow of the government of the United States or of this Commonwealth, and forswears such advocacy, or knowing membership in an organization which so advocates, during his period of employment by the Commonwealth.) Mrs. Intille further testified that she was not a member of the Communist Party when she subscribed to the loyalty oath. When questioned by the Committee concerning certain other people, she offered to waive her constitutional right to plead the Fifth Amendment and asserted her willingness to answer any and all of the Committee's questions concerning herself if the Committee would agree not to interrogate her about anyone else. The Committee refused to so agree. Mrs. Intille thereupon elected to exercise her constitutional privilege under the Fifth Amendment and refused to answer any questions concerning her association with certain other people and whether she had ever been a member of the Communist Party.

The transcript of the hearing before the Committee on November 18, 1953, at which Thomas Deacon appeared, disclosed that he had given the committee his name, address, and a resume of his education and employment as a teacher and as a counsellor at the Philadelphia Public Schools; that he had testified under oath that he was not a member of the Communist Party and that he had taken the Pennsylvania Loyalty Oath in April, 1952, and was not a member of the Communist Party at that time. He refused to answer any questions asked him by the Committee concerning whether he was a member of or had had affiliations with the Communist Party prior to 1952, electing to exercise his constitutional privilege under the Fifth Amendment.

solely on her appearance before the Congressional Committee" (Board of Education's Brief, p. 8). Such was the extent of the Board's case upon which it dismissed Mrs. Atkinson and Mrs. Intille from their positions as teachers of the Philadelphia School District on May 10, 1954, and May 28, 1954, respectively. Each of them thereupon appealed the dismissal to the Superintendent of Public Instruction of the Commonwealth, as allowed by Section 1131 of the School Code.

Deacon, likewise, was not interrogated by the Board or by the Superintendent at his hearing on the charge of incompetency but voluntarily offered himself as a witness and testified "freely" and "fully" concerning the matters which the Committee had inquired about but which he had then refused to answer. He testified that he had been a member of the Communist Party at one time but had been dropped from it prior to 1945 for non-payment of dues and non-attendance at meetings; that he had joined the Communist Party in late 1938 or early 1939 but had never taken any Party oath or signed any membership card or application; that he had been attracted to the Communist Party because he was interested in idealistic causes and that, at the time he joined, the Communist Party was one of a number of organizations which were opposing fascism, anti-Semitism and segregation and were promoting trade unionism, fair employment practices and other liberal causes in which he was interested; that he had attended some meetings in connection with these causes but had never held any office in the Communist Party or served on any of its committees; that he had never heard during his membership in the Communist Party any advocacy of the violent overthrow of the government and that, if he had heard such a thing, he would have left the Party immediately and would have reported the matter to the civil authorities. He reiterated his testimony before the Committee that he was not a member of the Communist Party in 1952 when he took the Pennsylvania Loyalty Oath and testified further

that he had had no connection with the Communist Party whatever for a period of seven or eight years prior to that time and no longer had any affection or sympathy for it.

As a result of Deacon's hearing, the Board, on June 29, 1954, dismissed him as a teacher of the Philadelphia Public School District on the ground of incompetency. He forthwith appealed the order of dismissal to the Superintendent of Public Instruction of the Commonwealth. Section 1131 of the School Code.

On January 17, 1955, the Superintendent of Public Instruction dismissed all three appeals, viz., Mrs. Atkinson's, Mrs. Intille's and Mr. Deacon's and affirmed the action of the Board of Education in dismissing them as teachers of the Philadelphia Public School District on the ground of incompetency. Separate appeals were taken by the appellants from the respective orders of the Superintendent of Public Instruction to the several courts of common pleas of Philadelphia County as authorized by Section 1132 of the School Code. The final orders of the courts below, sustaining the action of the Superintendent of Public Instruction, are the subjects of the present appeals to this court.

The three co-ordinate courts below each sustained the order of dismissal before it in the mistaken belief that the question involved was ruled adversely to the appellant's contention by this court's decision in *Board of Public Education, School District of Philadelphia v. Beilan*, 386 Pa. 82, 125 A. 2d 327, *aff'd* 357 U. S. 399. The error in that conclusion is patent. What the Board of Education sought to accomplish in these cases goes far beyond anything that was either decided or implied by the opinion for this court in Beilan's case. His adjudged incompetency resided exclusively in the fact that he had refused to answer questions of his *administrative superior* (Superintendent Hoyer) concerning matters deemed to have bearing on his qualifications as a teacher in the public schools of Philadelphia, and not that he had refused to answer questions of a Congressional Committee. That such was the *ratio decidendi* in the

Beilan case is not open to question. Speaking for this court, Mr. Justice Chidsey said, "The secretiveness [of Beilan] consisted of a deliberate and insubordinate refusal to answer the questions of *his administrative superior* in a vitally important matter pertaining to his fitness. *Such conduct* stamped him with *incompetence* as a professional employee in the public schools." (Emphasis supplied). And, the Supreme Court of the United States, in affirming, recognized that such was, indeed, the rationale of this court's decision, saying in that regard,—"He [Beilan] did, however, undertake obligations of frankness, candor and cooperation in answering the inquiries made of him by *his employing Board* examining into his fitness to serve it as a public school teacher." (Emphasis supplied). Neither in this court nor in the Supreme Court was the fact that Beilan had pleaded the Fifth Amendment before the Committee availed of as ground for the decision.

The appellee Board is well aware of the distinction between *Beilan* and the present cases. In the Board's brief on these appeals, it is stated (p. 16) that "The present cases differ from the *Beilan* case in that the teacher's refusal to answer questions occurred before a Congressional Committee rather than before his administrative superior." The Board also recognizes (Brief p. 16) that this court did not pass upon Beilan's refusal to answer the Congressional Committee as a ground for his dismissal and that "... the *Beilan* case in the Supreme Court of the United States did not involve a dismissal where there was a claim of privilege against self-incrimination * * *". (Brief p. 30.)

In the cases now before us, none of the appellants refused to answer any question propounded by Superintendent Hoyer or by the Board of Education touching his or her qualifications as a teacher or their conduct as citizens or in any other capacity. As already stated, neither Mrs. Atkinson, Mrs. Iatilie nor Mr. Deacon was asked any questions by the Superintendent or by the Board except when Deacon, having voluntarily offered himself as a witness at

his hearing before the Board, "answered every question which he was asked" and "freely", as the brief for the Board of Education concedes (pp. 40 and 41).

It stands out too clearly for any misunderstanding that the *only* thing for which the appellants were dismissed by the Board was that they had refused to answer certain questions of a Congressional Committee upon a proper plea of privilege against self-incrimination under the Fifth Amendment. This, the brief for the Board of Education acknowledges where it states (p. 3), "The charges were based on the refusal of the appellants to answer questions concerning their alleged membership in and association with the Communist Party, under a plea of the privilege of the Fifth Amendment of the Federal Constitution during appearances before the Committee on Un-American Activities of the House of Representatives, Congress of the United States." Confirmation of the real basis for the charges is to be found in the Board's rejection of Mrs. Intille's offer of proof of her good reputation "because the charge against her was based solely on her appearance before the Congressional Committee" and the Board's further acknowledgment (Brief p. 41), that "The charge against Deacon was that he refused to answer the [Un-American Activities] Committee, and [that] this was the incompetency", viz., the incompetency for which he was dismissed as a teacher!

That the action of the Board in dismissing the appellants, as teachers with tenure, upon the asserted ground of incompetency was a penalty inflicted upon them by State action for having invoked, in a strictly federal proceeding, the privilege against self-incrimination under the Fifth Amendment, is too plain to be obscured by attenuated reasoning. Such being the unmistakable legal situation revealed by each of these appeals, application of the principle recognized by the Supreme Court in *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, is manifestly indicated.

Slochower, an associate professor in a college operated by the City of New York, was summarily discharged because, while testifying before the Internal Security Sub-committee of the United States Senate, he refused to answer questions concerning his alleged membership in the Communist Party in years past on a plea of privilege against self-incrimination under the Fifth Amendment. The particular Section of the New York City Charter under which Professor Slochower was discharged provided that, whenever an employee of the City makes use of the privilege against self-incrimination to refuse answering a question relating to his official conduct, "his term or tenure of office or employment shall terminate and such office or employment shall be vacant * * *" etc. Slochower was entitled to tenure under New York's Education Law and could be discharged only for cause after notice and hearing with right of appeal. The Supreme Court held that his summary dismissal as a teacher denied him due process in violation of the Fourteenth Amendment and, accordingly, reversed his discharge.

Counsel for the appellee in the cases now before us argues that all that the *Slochower* case decided was that he had been denied procedural due process. But, that was not all that the *Slochower* case adjudicated, as we read it. True enough, his summary dismissal without notice and hearing denied him procedural rights protected by the due process requirement of the Fourteenth Amendment; and it is also true that the Supreme Court's judgment of reversal remanded the case "for further proceedings not inconsistent with this opinion." It is clear, however, that the open order of remand was required in the circumstances. The Supreme Court recognized that "The State has broad powers in the selection and discharge of its employees and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State." Necessarily, therefore, what might subsequently be developed at a proper hearing was not to be foreclosed by the attendant order reversing Slochower's dismissal, not

only because of the manner in which, but also the reason for which his discharge had been effected. The *Slochower* case decided that "to discharge an employee merely because he relied upon the Fifth Amendment plea of self-incrimination to avoid answering questions which he would be otherwise required to answer" constituted a denial of substantive due process. Such was, indeed, the appraisal of the dissenting justices as to the intended scope and effect of the majority's holding in the *Slochower* case (see p. 561 of 350 U. S.). And, that is what we take to have been the ruling in *Slochower* on the merits of the ground assigned by the Board for summarily dismissing him.

In speaking for the majority in the *Slochower* case, Mr. Justice Clark, after condemning "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment" and, after recognizing that "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury", declared, (p. 559) that, " " " the Board seized upon [Slochower's] claim of privilege before the federal committee and converted it, through the use of § 903 [of the New York City Charter] into a conclusive presumption of guilt", and then concluded by holding that "Since no inference of guilt was possible from the claim before the federal committee, the discharge falls of its own weight as wholly without support. There has not been the 'protection of the individual against arbitrary action' which Mr. Justice Cardozo characterized as the very essence of due process. Ohio Bell Telephone Co. v. Commission, 301 U. S. 292, 302."

Counsel for the Board urges upon us that, unlike in *Slochower*, here the condemned teachers were given hearings. The distinction is plainly immaterial. Hearing or no hearing, the dismissals in the instant cases were for the same invalid reason for which Slochower had been discharged, namely, the refusal to answer upon a plea of privilege under

the Fifth Amendment before the Congressional Committee. Incidentally, the hearings given the appellants did not meet the basic requirements of procedural due process; they were not "full" hearings. But, we make no point of that presently except to note, in passing, that the Board's evident anxiety to keep from appearing to be finding the appellants guilty of disloyalty by inference, drawn from their refusal to answer the Congressional Committee's questions, had so submerged the alleged deficiency, with which the appellants were actually charged (and for which they were dismissed), viz., incompetency, that the Board failed to realize at Mrs. Intille's hearing that the proof she offered, which was rejected as irrelevant, had a direct bearing on the question of her competency. Also, counsel for the Board objected at Deacon's hearing to the reception of *any* testimony from him, including even an explanation of how he had come to join the Communist Party at an earlier time. The Board, however, overruled the objection and permitted Deacon to testify.

Deacon might as well have not volunteered his unrestrained revelation of his buried aberration of the past. Although he expressed regret and contrition for his earlier Communist Party association, and notwithstanding his background of twenty-four years of continuous "satisfactory" teaching service in the Philadelphia Public Schools, he was dismissed although this court's manifest intendment in the *Beilan* case (p. 95), was that a *locus penitentiae* must be recognized and honored "where a teacher has been dismissed who has entirely discarded past subversive affiliations and has abided by the loyalty oath taken in good faith." Not one word of evidence, oral or documentary, was introduced at the Board hearing to controvert Deacon's testimony that he had discarded past subversive affiliations some nine or ten years before and had abided in good faith the obligations of the loyalty oath which he took in 1952.

It is our opinion that the cases before us are squarely ruled in the appellants' favor by the Supreme Court's de-

cision in the *Slochower* case and that, consequently, the orders of dismissal, which were based solely on the appellants' refusal to answer upon a plea of privilege against self-incrimination under the Fifth Amendment before a Congressional Committee must be reversed as constituting State action denying them the due process guaranteed by the Fourteenth Amendment.

The Board argues that *Slochower* is distinguishable from the cases before us, citing illustrative of the suggested distinction the reasoning of the California District Court of Appeals in *Nelson v. County of Los Angeles*, 163 Cal. App. 2d 607, 329 P. 2d 978, and *Globe v. County of Los Angeles*, 163 Cal. App. 2d 595, 329 P. 2d 971. Nelson was a permanent social worker employed by the County's Department of Charities, while Globe was a temporary employee of the same department. Both were subpoenaed to and did appear before a Sub-committee of the House Un-American Activities Committee but refused to answer certain questions asked them concerning subversion. They had been ordered by the County Board of Supervisors to answer any questions asked by the Sub-committee, relating to subversive activity, pursuant to § 1028.1 of the California Code which made it the duty of any public employee to give testimony relating to any such activity on pain of discharge "in the manner provided by law." The County discharged both of them on the ground of insubordination and violation of § 1028.1 of the Code. Nelson, who had tenure, requested and was given a hearing before the Civil Service Commission, the result of which was the confirmation of his discharge. Globe was denied a hearing because, as a temporary employee, he was not entitled to one under the Civil Service rules, which he did not dispute. On appeal the discharges were affirmed by the California District Court of Appeals, as above cited. Both Nelson and Globe petitioned the Supreme Court for certiorari which was granted: 360 U. S. 928. In the Supreme Court, each contended that his discharge was based upon his invocation before the Sub-committee of his constitutional

rights under the First and Fifth Amendments. A judgment of affirmance was entered by the Supreme Court on February 29, 1960, in Nelson's case by an evenly divided court without discussion. At the same time, the Supreme Court handed down a five to three decision affirming Globe's discharge, 362 U. S. 1.

We do not consider the decision in the *Globe* case to be controlling here. Several distinctions are to be noted which may have been persuasive with the majority in the *Globe* decision. For example, Globe, as a temporary employee without tenure, was dischargeable for any reason at any time, and without notice or hearing. His letter of dismissal ascribed his discharge to insubordination for failure to comply with a specific order. In answering Globe's contention that his discharge was based on his invocation before the Committee of his constitutional privileges, Mr. Justice Clark, speaking for the majority said, "But the record does not support even an inference in this regard, and both the order and the statute upon which the discharge was based avoided it." Also, the court expressly distinguished *Globe* from *Slochower* on the specific ground that California had made a "choice of securing such information by means of testimony before a federal body." No such choice has ever been, nor could be, claimed under Pennsylvania's Public School Code. The "'built-in' inference of guilt, derived solely from a Fifth Amendment claim", which the Supreme Court said in *Globe* was present in the New York statute in *Slochower*, is exactly what the Board of Education sought to "build-in" in the present cases without the activation of statute.

We conclude, therefore, that the dismissal of the appellant teachers by the Board of Education for having refused to testify in a Congressional hearing, on a plea of the privilege against self-incrimination under the Fifth Amendment, denied them due process contrary to the Fourteenth Amendment of the Constitution of the United States.

We are also of opinion that the appellants' dismissals, as teachers, because they refused to answer certain of the

Committee's questions on a plea of the Fifth Amendment's protection against self-incrimination, constituted an abridgment by State action of a privilege of the appellants' National citizenship available to them in a Federal proceeding. In so saying, we are, of course, not unmindful that the Supreme Court has directly ruled that some of the privileges guaranteed the individual citizen by the Bill of Rights are not protected inviolate by the Fourteenth Amendment against State action. Specifically, the privilege under the Fifth Amendment not to be compelled to incriminate one's self does not preclude a State from compelling self-incriminatory testimony in State trials: *Adamson v. California*, 332 U. S. 46, 50-51; *Twining v. New Jersey*, 211 U. S. 78, 111, 112; cf. *Palko v. Connecticut*, 302 U. S. 319, 323-324.

The *Twining* and *Adamson* cases, supra, were concerned with State rules (New Jersey and California, respectively) which permit the prosecuting attorney and the judge in criminal trials to comment upon, and the jury to consider, the failure of the accused to testify in denial of incriminating evidence introduced against him. Twining and Adamson severally contended that the State rules constituted an abridgment of their privilege against self-incrimination under the Fifth Amendment. The Supreme Court rejected the contention, saying in the *Adamson* case (which was an avowed re-affirmation of the conclusion in the *Twining* and *Palko* cases), "It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights" (pp. 50-51).

The *Palko* case involved a procedure under a Connecticut statute which allows an appeal in criminal cases by the State's Attorney, with permission of the trial judge, on

questions of law. If the judgment is reversed on the State's appeal, a retrial of the accused on the same indictment may be had with the possibility of a verdict against him for even a higher degree of guilt than was found at the prior trial. Palko contended that the State procedure abridged his privilege against double jeopardy under the Fifth Amendment. This contention was likewise rejected by the Supreme Court.[7] In the opinion for the court, Mr. Justice Cardozo noted with contextually evident approval that "This court has said that, in prosecutions by a state, the exemption [i.e., against self-incrimination] will fail if the state elects to end it", citing *Twining v. New Jersey*, supra.

It is clear from the foregoing that the privilege against self-incrimination under the Fifth Amendment, which is an attribute of National citizenship, is not protected by the Fourteenth Amendment against State action for local uses and purposes incident to State citizenship (both National and State citizenship being recognized by the Fourteenth Amendment as co-existing in the same person). Consequently, while the State may restrict the privilege against self-incrimination in State actions without violating the Fourteenth Amendment, it may not, as was done in the cases now before us, impose a penalty upon a citizen's pleading in a Federal proceeding his privilege against self-incrimination under the Fifth Amendment. To hold otherwise would be to render the Constitution of the United States less than "the supreme Law of the Land" which Article VI declares it to be, and would allow a State to do what the United States itself cannot constitutionally do, namely, nullify the privileges of the Bill of Rights in Federal proceedings. As is well known, the rights conferred by Articles I to VIII, inclusive, which embrace what is popularly known as the Bill of Rights, were originally effec-

7. Palko was convicted of murder in the second degree at his first trial. On the State's appeal, the judgment of sentence was reversed and the accused was found guilty of murder in the first degree, with sentence of death, at his re-trial, which was affirmed by Connecticut's Supreme Court of Errors and by the Supreme Court of the United States.

tive against the Federal government alone. The fact that some of such privilges and immunities have since been made effective against the States also, "by absorption" through the Fourteenth Amendment, in no way lessens or impairs the enduring effectiveness against the Federal government of the privileges and immunities of the Bill of Rights. The *Adamson* opinion so recognized where it observed (p. 53) that the Fourteenth Amendment left "* * * to the states the responsibility of dealing with the privileges and immunities of their citizens *except those inherent in national citizenship.*" (Emphasis supplied.) What could be more inherent in National citizenship than the right to plead the Fifth Amendment against self-incrimination in a Federal proceeding?

It follows from what we have said that the appellants' dismissals by the Board of Education, because they refused to answer certain questions of the Congressional Committee on a plea of the Fifth Amendment's protection against self-incrimination, deprived them of liberty and property without due process of law and, at the same time, worked abridgment by State action of the same constitutional privilege, all in violation of the Fourteenth Amendment.

One further matter calls for consideration.

For a public school teacher to plead a constitutional privilege, in appropriate circumstances, does not prove the teacher's incompetency within the intended scope of that term as used in our Public School Code; the plea is not even relevant as evidence of incompetency. Just as remaining mute, upon a plea of the Fifth Amendment, carries no implication of guilt of the matter inquired about in the unanswered questions (see *Slochower v. Board of Higher Education of New York City*, supra) so also does the plea not carry an implication of the pleader's *incompetency*. Nor is it of any materiality to a question of the pleader's competency whether or not the propriety of the plea against self-incrimination is conceded or rejected by the inquiring body so long as the plea is made in good faith

and is not plainly frivolous. There is no prerequisite to the exercise of the privilege against self-incrimination that the pleader must first establish affirmatively his good faith and lack of frivolity in entering the plea. The appellants' pleas of the Fifth Amendment did not prove their incompetency within the meaning of the Public School Code and, since their refusal to answer the Committee's questions, in reliance on the Fifth Amendment privilege, was all that was proven against them, the Board failed to make out a case for their dismissal.

But, the Board presently advances the idea that a teacher who refuses to answer a Congressional Committee's questions, implying possible subversive affiliations on the part of the witness, is incompetent within the meaning of the tenure provisions of our Public School Code. Such a contention transgresses what was thought to have been decided in *Beilan*, where we were assured that no question of loyalty was in any way involved.[8] If the refusal to answer a particular question is to be made a basis for the discharge of a professional employee, the question should, obviously, have for its purpose the eliciting of information concerning some matter material to the fitness of the employee to continue at work. This is so whether the question propounded be by a Congressional Committee or by the Board of Education itself. And, if the only material matter to which the question relates is possible disloyalty or subversion on the part of the employee, then any proceeding looking to his dismissal for refusal to answer questions relating to his possible disloyal or subversive activities or affiliations must be brought under the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 PS § 211 et seq. In a proceeding under that statute a teacher may be discharged if it is determined "by a fair preponderance of the evidence" that

8. See dissenting opinion of our brother Bell in *Beilan* where he said, pp. 110-111, "We cannot shut our eyes to the inescapable fact which we are convinced—notwithstanding the earnest, able argument of counsel for the Board—is glaringly disclosed by this Record: that Beilan was fired because the Board believed that he was a Communist." See also dissenting opinion in *Beilan* of the writer of the present opinion at bottom of p. 105.

he is a disloyal or subversive person; and "If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person." See Section 7 of the Act (65 PS § 217). What the Board of Education has attempted to do in these cases is to avoid the requirement of the Pennsylvania Loyalty Act that disloyalty or subversion, as a ground for the discharge of a public school teacher, must be proven "by a fair preponderance of the evidence." The Board's action evidences a belief that it has found a way to dismiss, without any evidence at all, teachers whom it suspects of disloyalty or subversion. Anything in the *Beilan* case to the contrary is herewith overruled for the future. In searching out and eliminating disloyalty or subversion among teachers in public schools the procedures of the applicable statute enacted for that purpose must be faithfully pursued, and violence must no longer be done the meaning of the word "incompetency" in order to circumvent the procedures of the Loyalty Act.

The orders of the courts below, now here on appeal at Numbers 331, 332 and 352, are severally reversed, and the records remanded for further proceedings not inconsistent with this opinion.

Mr. Justice Cohen filed a concurring opinion.

Mr. Justice Bell and Mr. Justice Eagen concur in the result.

Mr. Justice Musmanno filed a dissenting opinion.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BOARD OF EDUCATION SCHOOL DISTRICT OF PHILADELPHIA	Nos. 331, 332, 352 January Term, 1959. No. 331—Appeal of Angelina Intille No. 332—Appeal of Thomas Deacon No. 352—Appeal of Sadie T. Atkinson
ANGELINA INTILLE, THOMAS DEACON, and SADIE T. ATKINSON.	Appeals from Orders of Courts of Common Pleas of Philadelphia County: Appeal No. 331 (C. P. 5, at No. 8410, December Term, 1954); Appeal No. 332 (C. P. 1, at No. 8411, December Term, 1954); Appeal No. 352 (C. P. 3, at No. 8315, December Term, 1954).

CONCURRING OPINION

(Filed June 30, 1960)

COHEN, *J.*

I am in thorough accord with the opinion for the Court. On at least ten occasions during oral argument the author of the lengthy dissent attempted to discolor these proceedings by advancing the same thoughts he has now expressed in writing and, upon each occasion, counsel for the School Board, when questioned, frankly and clearly affirmed that the loyalty of the school teachers was not in issue. It

should be apparent to the least open minded that the only legal problem with which we are concerned and the only question briefed and orally argued on these appeals is whether a public school teacher is "incompetent" if the sole evidence of his alleged incompetency is that he availed himself of the privileges of the Federal Constitution in a Federal proceeding. This has been answered most adequately by the opinion for the Court.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BOARD OF EDUCATION SCHOOL DISTRICT OF PHILADELPHIA	Nos. 331, 332, 352 January Term, 1959.
	No. 331—Appeal of Angelina Intille
v.	No. 332—Appeal of Thomas Deacon
	No. 352—Appeal of Sadie T. Atkinson
ANGELINA INTILLE, THOMAS DEACON, and SADIE T. ATKINSON.	Appeals from Orders of Courts of Common Pleas of Philadelphia County: Appeal No. 331 (C. P. 5, at No. 8410, December Term, 1954); Appeal No. 332 (C. P. 1, at No. 8411, December Term, 1954); Appeal No. 352 (C. P. 3, at No. 8315, December Term, 1954).

DISSENTING OPINION

(Filed June 30, 1960)

MUSMANNO, *J.*

I dissent from the decision of the Court in this case because it imposes on the taxpayers of Pennsylvania an unwarranted burden to pay unearned wages to an ex-Communist who for six years was a dues-paying member of an organization committed to the overthrow of our government

by force and violence, while at the time engaged in teaching children in the public schools of Philadelphia.

I dissent from the decision of the Court because it imposes an unjust burden on the taxpayers to pay unearned salaries to two school teachers who, accused of belonging to the Communist Party while teaching school, refused to answer whether they were or were not members of this organization committed to the overthrow of our government by force and violence.

I further dissent from the decision of the Court because it compels the School Board of Pennsylvania to re-employ these three school teachers who lost their jobs through their own incompetence, disloyalty and failure to abide by the simplest rules of honesty, fair dealing and cooperation with representatives of the United States Government and of the school authorities of Pennsylvania.

I also dissent because, by restoring jobs to three incompetent teachers, unworthy of public trust, three other able, loyal, competent trained school teachers are being denied needed employment.

The three school teachers whom the School Board of Philadelphia have been ordered to restore to employment are Thomas Deacon, Angelina Intille and Sadie T. Atkinson.

Thomas Deacon was a member of the Communist Party from 1939 to 1945. Mrs. Intille testified before the House Un-American Activities Committee that she was not a member of the Communist Party in 1952 when she signed the Pecham Loyalty oath of loyalty, but she refused to say whether she was a Communist the day before or a week before she signed the oath. She also refused to answer the question as to whether she was a Communist in 1932. She further declined to answer the question as to whether she was a Communist when she was given her permanent appointment as a school teacher. When she was asked whether she had sent any communication to the Communist Party resigning from the Party, she declined to answer "on the grounds of the Fifth Amendment."

When Representative Walter asked her if she was ever a member of the Communist Party, she countered with the question: "Will this Committee agree to ask me no further questions." Obviously the Committee could not enter into any such crippling agreement and Mrs. Intille's testimony ended on her refusal to say whether she had ever been a member of the Communist Party.

Mrs. Sadie T. Atkinson appeared before the House Committee on Un-American Activities on November 17, 1953. She was asked if she had ever been a member of the Communist Party and she declined to answer, pleading the Fifth Amendment. The following then ensued:

"MR. KUNZIG: This Committee has sworn testimony, Mrs. Atkinson, by witnesses before the Committee, under oath, that you have been a member of the United People's Club of the Communist Party, is that correct?

MRS. ATKINSON: I decline to answer on the same grounds.

MR. KUNZIG: We also have sworn testimony that your Communist membership book in the year 1945 was Number 86905? Did you have such a Communist Party membership book?

MRS. ATKINSON: I invoke the privileges of the Fifth Amendment on the same grounds."

Being a Communist in the United States carries with it such civic disabilities, social disadvantages, and personal opprobrium that it is inconceivable that anyone who is not a Communist would not deny being a Communist when asked the question, unless, of course he is mentally defective or is engaged in counter-espionage as a government agent, neither of which contingencies enter into the cases before us. Many Court decisions have held that calling a non-Communist a Communist is slander or libel *per se*, depending on whether the statement is an oral or a written one. In the

case of *Spanel v. Fegler*, 160 F. 2d 619, the United States Circuit Court of Appeals, 7th Circuit, said:

> "In Illinois it is libelous per se to write of a man or a corporation that they are Communists or Communist sympathizers, because the label of 'Communist' today in the minds of many average and respectable persons places the accused beyond the pale of respectability and makes him a symbol of public hatred."

A head note in the case of *Grant v. Reader's Digest Ass'n*, 151 F. 2d 733, reads:

> "Under New York law, it is libelous to write of a lawyer that he has acted as agent of the Communist Party and is a believer in its aims and methods."

United States District Court Judge Conger said in the case of *Remington v. Bentley*, 88 F. Supp. 166, 170, that:

> "I know of no accusation more discreditive of a United States Government official with respect to the proper conduct of his office than that he is a Communist."

Is such an accusation any less discreditive of a school teacher, and if the accusation is not true, why wouldn't the school teacher deny it?

In a case in our own Court, *McAndrew v. Scranton Republic Pub. Co.*, 364 Pa. 504, the question arose as to whether it was libellous to attribute to a person the remark:

> "Of course, we all have to have a little Communism today."

Chief Justice Jones, then Justice Jones, wrote in his Dissenting Opinion in that case that such a remark was "unquestionably defamatory." Revealing an exhaustive study of the subject, he wrote further:

> "As has been widely held, the meaning of such a remark is that the orator is a Communist or a Communist sympathizer. And, for the past twenty-five years in this

country such a charge has generally been held to be defamatory. . . . Even the word 'Red', applied by a newspaper to a particular individual, was held to be defamatory as being reasonably understood to mean a person believing in disobedience to law and in favor of the appropriation by force and sabotage of the property of others: Toomey v. Jones, 254 P. 736, 124 Okla. 167; see also Annotation 51 A. L. R. p. 1071 et seq.

The majority opinion seeks narrowly to dissipate the defamatory character of the Communist imputation by limiting the meaning of that term to people supporting the Russian government with which country this Nation had lately been an ally wherefore the term carried no publicly stigmatizing connotation. No such restricted sense of the term 'Communist' has come to my attention from any other jurisdiction in this country. On the contrary, in Mencher v. Chesley, supra, the Court of Appeals of New York, in treating in 1947 with a 1944 publication charging one with being a Communist, said that,—'Today and in the recent past—whether or not communism stands for violent overthrow of government . . . it is undeniable that for communism and its adherents and sympathizers, there has been wide spread public aversion. Evidence of that antipathy is found not only in public opinion polls and in other studies . . . . but also in legislation and executive orders enacted and promulgated during the past several years [prior to 1947] which subject communists and their affiliates and sympathizers to loss of public office and private position and, in some cases, even to deportation proceedings [citing authorities].' It was there also said that 'it is no answer [to a charge of libeling another by calling him a Communist] that communists may function as a recognized political party.' See Democracy and Defamation, 42 Col. Law Rev. 1282, 1304 (1942). In Spanel v. Pegler, supra, the charge of

Communism there complained of was made in March of 1945 when we were actually (and not merely lately) an ally of Russia and the publication was nonetheless held to be defamatory."

There can be no question whatsoever, especially since the Korean War, when Communists killed 30,000 Americans, that the attributing of Communist Party membership to a non-Communist is a libel of a particularly aggravated character. Who can doubt that there is no loyal American who would not bitterly resent being called a Communist, particularly since it is unquestioned knowledge that the Communists today (and in 1953-4 when these appellants were questioned) are responsible for the international tensions, hatreds, animosities and bellicosities which may at any time burst into a nuclear war which, of course, will mean the annihilation of most of the human race? I repeat, therefore, that it is utterly inconceivable for one who is not part of the international conspiracy to destroy democratic government in the United States to deny being a member of the Communist Party, if so accused, unless he is insane or of moronic intellect.

The three persons involved in this litigation are not of inferior intellect. Mrs. Atkinson is a graduate of the Philadelphia Normal School and Temple University. Mrs. Intille is a graduate of the Philadelphia Normal School. Deacon is a graduate of the Philadelphia Normal School and obtained bachelor's and master's degrees in counseling at the Temple University.

None of them can deny knowing that Communism is the major menace of our time, imperiling the very existence of Western civilization. None of them can possibly deny knowing that it is because of the international Communist Party, with its never-ending threat of exterminating war, that we are required to keep our nation on a continuous war footing, that American youth is constantly on call for war service, that the American people are almost being bled

white with taxation in order to maintain the crushingly burdensome war machine, that, despite repeated and never-relenting efforts on the part of the United States, to bring about disarmament with inspection, international Communism refuses to agree, and that the international Communist Party is responsible for riots, revolutions, and continuous agitation in all parts of the world.

The three appellants in this case know that the Communist Party in the United States is merely a part of the international Communist Party, with directing headquarters in Moscow, and that every member of the Party is committed to the Party line. The three appellants in this case know, as said by J. Edgar Hoover, Director of the Federal Bureau of Investigation, that:

> "To make the United States a communist nation is the ambition of every Party member, regardless of position or rank. He works constantly to make this dream a reality, to steal your rights, liberties, and property. Even though he lives in the United States, he is a supporter of a foreign power, espousing an alien line of thought. He is a conspirator against his country."*

William Z. Foster, long-time head of the communist movement in the United States, has pictured a Soviet America with the liquidation of all particular parties,

> "the Communist party functioning alone as the Party of the toiling masses. Likewise, will be dissolved all other organizations that are political props of the bourgeois rule, including chambers of commerce, employers' association, rotary clubs, American Legion, Y. M. C. A., and such fraternal orders as the Masons, Odd Fellows, Elks, Knights of Columbus, etc."

Director Hoover describes further what could and would be expected in a Soviet America:

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* Masters of Deceit, Hoover, Henry Holt, 1958.

"The press would be muzzled, free speech forbidden, and complete conformity demanded. If you expressed an opinion contrary to the Party line, you should have known better and your 'disappearance' would serve as a lesson for others. Fear becomes an enforcement technique." (Masters of Deceit, P. 8.)

The three school teachers in this case cannot profess ignorance of the atheistic character of Communism, and that Foster warns that when the Soviets take over in America,

"God will be banished from the laboratories as well as from the schools."

Nor can they fail, as educated people, to be acquainted with Lenin's repudiation of moral precepts:

"We repudiate all morality that is taken outside of human, class concepts . . . We say that our morality is entirely subordinated to the interests of the class struggle."

If Deacon, Intille and Atkinson did not subscribe to these completely unAmerican precepts, why didn't they denounce the Communist Party program when asked, by representatives of the United States Congress, about their association with the Communist Party? Can adherence to the Communist Party program be reconciled with the moral behavior expected of American school teachers? And if Deacon, Intille and Atkinson have such a feeling and conviction about the Communist Party that they refuse to be identified with those who oppose the Communist international conspiracy, why should the taxpayers of Pennsylvania be compelled to pay them salaries for the time that they were idle as the result of their hostile conduct before representatives of the American people?

I have offered some quotations on the meaning and purpose of the Communist Party because the Majority ignores the subject entirely in its Opinion. In order to have a thorough understanding of the issues involved in this liti-

gation it is necessary to be reminded what the Communist Party is.

The appellants here were asked if they formed part of an organization whose objectives have authoritatively been spelled out by Congress as presenting a clear and present danger to our country:

> "The Communist organization in the United States pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, *presents a clear and present danger to the security of the United States and to the existence of free American institutions.*" * (50 U. S. C. A. p. 438)

One might gather from reading the Majority Opinion that the organization about which the appellants were questioned is some innocuous debating society or some interdicted fishing club. In point of sobering and frightening fact, the school teachers here involved were asked what associations they had with the most evil, traiterous, treacherous, murderous organizations that ever disgraced past and current history's pages. One of them refused before the House Un-American Activities Committee to discuss his Communist Party affiliation but admitted to the School Board later that he had been a Communist for six years. Another of the appellants refused to deny membership, and the third blandly remained mute when advised of sworn testimony of a Communist membership book issued in his name. Not one denounced the Communist Party whose goal was described by Justice Jackson of the Supreme Court of the United States in the following cogent language.

> "The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. . . . Violent and undemocratic means are the calen-

* Italics throughout, mine.

lated and indispensable methods to attain the Communist Party's goal . . . In not one of the countries it now dominates was the Communist Party chosen by a free or contestible election; in not one can it be evicted by any election. The international police state has crept over Eastern Europe by deception, coercion, coup d'etat, terrorism and assassination. The American Communist Party has copied the organizational structure and its leaders have been schooled in the same technique and from the same tutors." (*American Communications Ass'n v. Douds*, 339 U. S. 382, 425-429.)

Justice Jackson said further that "there is certainly sufficient evidence that *all members* owe allegiance to every detail of the Communist Party program and have assumed a duty actively to help execute it."

Deacon has admitted allegiance to the Communist Party so that as a member of it, he helped to further the revoluntary aims of the Party—while teaching school children in Philadelphia. Intille and Atkinson knew of the aims of the Communist Party, they knew that to be charged with membership in it was to be charged with participating in its nefarious plotting for revolution, bloodshed and supremacy of the dictatorship of the proletariat. Then, if they had not been members why did they not deny that membership? Is that the type of person who should be teaching the school children of Pennsylvania?

In the whole twenty pages of the Majority Opinion there is not one word of criticism of the conduct of these three teachers who certainly did not comport themselves as ideal tutors of youth. In fact, there is in the Majority Opinion even a spirited defense of Thomas Deacon who admits that from 1938 or 1939 until 1944 or 1945, he was a member of the Communist Party and paid dues. Incidentally, these dues were proportioned to his salary so that the taxpayers were, in effect, paying Deacon's dues to an organization committed to destroying the American schools.

During the years Deacon was an active member of the Communist Party he attended their meetings and, on occasion held Communist meetings in his own home.

Before the House Un-American Activities Committee Deacon refused to speak of his Communist activities, but within the privacy of the hearing before the School Board he attempted to explain why it was that he categorically declined to answer the questions put to him by members of Congress. He said for one thing that if he told about the Communist meetings he attended he would have visited harm upon others. When asked to explain this remark he replied:

> "I mean the Velde committee could make at least a thousand people in this school system either go to jail on contempt, perjury, or through the Fifth Amendment, if they answered truthfully. At least a thousand."

This patent absurdity was equalled by many other grotesque statements such as the one that during his entire six years' membership in the Communist Party he never heard any advocacy of violent overthrow of the government. The Majority accepts Deacon's statement without a grain of incredulity.

Deacon's statement is an insult to intelligence. Every Communist member is required to study the literature of the Party, which is one continuing litany of appeal to violence. Director J. Edgar Hoover states in his book that a Communist Party directive specifically warns:

> "Every Communist must read and study the classics of our literature past and present. Everyone must rigorously enforce the slogan, 'One night a week for Marxist study'."*

Hoover explains that this "means daily readings in the communist bible—the works of Marx, Engels and Lenin," and that "this communist education, like all phases

* Masters of Deceit 162.

of the Party's program, is geared to *revolutionary action.*"**

The *Communist Manifesto*, which is the very primer of Communist education, and which every Communist must know practically by heart, flatly and unabashedly declares:

> "The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained *only by the forcible overthrow of all existing social conditions.*"

Lenin's masterpiece, *State and Revolution*, next in importance only to the *Communist Manifesto*, puts the proposition quite clearly when it says that "The replacement of the bourgeoisie by the proletariat state is impossible without a violent revolution." What does Lenin mean by revolution? He leaves no one in doubt:

> "Revolution is undoubtedly the most authoritative thing possible. It is an act in which one section of the population imposes its will on the other by means of rifles, bayonets, cannon, i.e., by highly authoritative means, and the victorious party is inevitably forced to maintain its supremacy by means of that fear which its arms inspire in the reactionaries."

The Majority seeks to palliate the enormity of Deacon's disloyalty for six years (because membership in the Communist Party cannot be regarded otherwise, by referring to it as a "buried aberration of the past.") The Majority pleads *locus penitentiae* in his behalf and cannot understand why the Board of Education would want to dismiss a school teacher who has broken with his evil past. I suppose that practically every murderer regrets having killed his victim, especially when he is caught. I don't doubt that every robber regrets having clubbed an innocent passerby and taken his money, especially when he is brought into court for sentencing. It can be assumed that when a person

** Ibid. 163.

betrays his country and his eyes awaken to the monstrousness of what he has done, he may be sorry. It is said that Benedict Arnold in his old age bitterly regretted having bartered the cause of American liberty for English pounds, but that did not restore to him the glorious uniform he wore at Saratoga.

Should the school children of Philadelphia have to take as a mentor a man who had such little regard for the welfare of his country that for six years he paid out money to advance the program of an organization which had and has but one main objective, and that is to turn the United States into an atheistic Soviet Satellite?

I have said that the Majority has taken Deacon's testimony without a grain of salt. It has gone further. It has taken it and seasoned it with fantasy. The Majority says that Deacon "expressed regret and contrition for his earlier Communist Party association." There is not one word in the entire record which shows any regret or contrition on his part for participating in the Communist conspiracy for six years. He did answer in the affirmative some very leading questions to the effect that he no longer had any affection or leaning for the Communist Party but he never offered one word of criticism of the Party or its aims or its treasonable objectives. I studied minutely the 45 pages of his testimony hoping to come upon some breast-beating of contrition which the Majority imaginatively ascribes to him, but I found not a word of sorrow for having turned his back for six years on the ideals of the United States while receiving the toil-stained dollars of her working taxpayers.

He left the Communist Party not out of principle, not because he found anything wrong in what Lenin, Stalin and Khrushchev advocated, not because it was Russia's evil alliance with Hitler which precipitated the catastrophic World War II, not because Moscow's clear intentions are to destroy democratic government throughout the world, and particularly in America. No, he did not leave the Communist Party for any of these reasons. He left only because of "inertia."

He was asked specifically:

> "Mr. Deacon, will you tell us exactly why you got out of the Communist Party? Why did you leave it?"

His answer was:

> "I would say social inertia, and something that took its place. My daughter, for the past five years, which is a terrifically important thing to me, a personal thing."

He added another reason: age. His words:

> "Age. That is what it is. I am forty-seven years old. I am a little different than I was ten years ago."

But he is not so different that he gave up membership in the Teachers Union, which was expelled from both the A. F. of L. and the C. I. O. because it was Communist-dominated. Nor did he break with the Communist Party completely when he supposedly left it. His wife remained a member of the Communist Party for another year and a half.

And this is the man for whom the Majority takes up cudgels and seeks to portray as a very much abused citizen, for whose treatment the School Board should practically apologize and the taxpayers should be glad to pay over to him a salary he did not earn, a salary made up of dollars which carry the sacred motto: "In God We Trust," a motto which for at least six years Deacon ignored and reviled as a member of the anti-God, atheistic Communist Party.

In an Opinion that is unusually sharp and severe the Majority castigates the Philadelphia Superintendent of Schools for having rated Deacon "unsatisfactory" when for the previous 24 years he had drawn a rating of "satisfactory." This is not an unheard of phenomenon in life. Until the arsonist burns down his first house, even the fire insurance writer may rate him as a satisfactory citizen. Not every incendiary is found out before he accomplishes his

first big conflagration. The school authorities did not know that while Deacon was supposedly teaching the children of Philadelphia the principles of good American citizenship he was meeting with agents of a hostile ideology who were planning and plotting to replace the Stars and Stripes with the hammer and sickle over every schoolhouse in America—and so Deacon got his rating of "satisfactory" year after year.

The Majority has not a word of commendation for the earnest efforts of the School Board of Philadelphia dedicated as it is to the highest ideals of education, doing their work without compensation and interested only in seeing that every schoolhouse is indeed a citadel of American freedom. And so the Majority finds fault with everything the School Board has done in this case and even visits stern censure on the Superintendent for having re-rated Deacon two days after he refused to answer questions put to him by the Congressional Committee, and having re-rated Atkinson and Intille three days after their default. To emphasize its displeasure the Majority underscores the *two* and *three* days, suggesting unseemly haste on the part of the Superintendent. But why should the Superintendent not have done his duty at once when he learned that Deacon, Intille and Atkinson had demonstrated themselves to be unsatisfactory teachers?

The School Board, in its argument before this Court, both orally and by brief, cited the case of *Board of Public Education v. Beilan*, 386 Pa. 82, as a precedent for dismissing the three school teachers here. The Majority has repulsed the attempted similarity. The Majority says that the school teacher Beilan was dismissed for a reason entirely different from the reason which motivated the dismissal of the appellants here. The Majority Opinion says in this regard:

> "His [Beilan's] adjudged incompetency resided exclusively in the fact that he had refused to answer ques-

> tions of his *administrative superior* (Superintendent Hoyer) concerning matters deemed to have bearing on his qualifications as a teacher in the public schools of Philadelphia, and not that he had refused to answer questions of a Congressional Committee."

The Majority Opinion discusses the *Beilan* case for two pages but never once mentions just what was the "disqualification" which justified Beilan's dismissal by the School Board. The fact of the matter is that Beilan was dismissed because he refused to answer the question as to whether he was a Communist, the very reason involved in the case at bar! The Majority's use of the guarded phrase "matters deemed to have bearing on his qualifications as a teacher," conveys the impression that Beilan was dismissed because he was deficient as a teacher in that he lacked sufficient knowledge in mathematics or Latin or geography, or perhaps stuttered. But it was nothing of the kind. He was dismissed because when he was asked by the Superintendent and a Congressional Committee if he was or had been a Communist he refused to answer.

The Majority attempts to distinguish between the *Beilan* case and the case at bar by saying that Beilan "had refused to answer questions of his administrative superior," whereas, here, a Congressional Committee was involved. But it is interesting and significant to note that Chief Justice Jones in his Dissenting Opinion in that case said:

> "The Board avows that it dismissed him [Beilan] for 'incompetency' under the Public School Code for his refusal to answer a question by the Superintendent of Schools on two occasions (June and October, 1952) as to whether he had been press director of the professional section of the Communist Political Association eight years before *and* for his refusal to answer questions of similar nature by counsel for a subcommittee of the Un-American Activities Committee of the House of Representatives on November 18, 1953." (Emphasis supplied.)

Thus, Beilan was dismissed not only because he refused to answer his immediate administrative superior officer, but also because he refused to answer the questions of a Congressional committee.

Thus, from a standpoint of law, the *Beilan* case is a perfect twin of the instant case and if it was proper to dismiss Beilan, how can the Majority refuse to affirm the dismissal of the three appellants here? It so happened in the *Beilan* case that the Superintendent asked Beilan about his Communist affiliations *before* the Congressional committee questioned him. In the case at bar, the Congressional committee questioned the appellants first. After the appellants had refused to answer the questions put to them by the Committee, it was quite superfluous for the Superintendent to question them again.

There is another startling factor in the *Beilan* case which further emphasizes its identity, legally speaking, with the present case. Beilan had been rated "satisfactory" as a school teacher for 23 years before his arrogant defiance of authority brought him an unsatisfactory rating. In this case Deacon had had a satisfactory rating for 24 years. Thus, the only difference between the two cases, in this respect, is that Beilan was not unmasked for 23 years while Deacon was able to deceive his masters for an additional year.*

* The Majority Opinion writer in this case has invited attention to the fact that in the *Beilan* case he wrote a Dissenting Opinion. Therefore, I do not believe that it is improper for me to quote from that Dissenting Opinion. Although here he distinguishes *Beilan* from the present case, arguing that Beilan was properly discharged whereas Deacon was not, yet in the *Beilan* case he pleaded as earnestly for Beilan as here he pleads for Deacon. This is what the present Majority Opinion writer said in his Dissenting Opinion in the *Beilan* case: "Here is a case of a long-time public school teacher [Beilan] entitled by statute to tenure, who is deprived of his professional status and livelihood because he pleaded the Fifth Amendment in refusing to answer questions of a congressional committee, touching his loyalty. He has never yet been confronted by his accusers or given an opportunity to cross-examine them."

The point of this quotation is to show that in the view of the Dissenting Opinion writer in *Beilan*, Beilan was discharged because of what he did before the Congressional Committee. The Majority Opinion in *Beilan* sustained Beilan's dismissal and, therefore, becomes authority and should be authority for this Court today, if stare decisis is a guide for us to follow.

But there is still a further oneness with the *Beilan* case. It was argued there, as it is argued here, that a refusal to answer questions is not a matter of competence. It was contended on behalf of Beilan that he was being dismissed on the question of loyalty and not competence and that the Court had no jurisdiction under the facts to try him for competence or lack of it. The Majority says the same thing here. It says:

> "If the refusal to answer a particular question is to be made a basis for the discharge of a professional employee, the question should, obviously, have for its purpose the eliciting of information concerning some matter material to the fitness of the employee to continue at work. This is so whether the question propounded be by a Congressional Committee or by the Board of Education itself. And, if the only material matter to which the question relates is possible disloyalty or subversion on the part of the employee, then any proceeding looking to his dismissal for refusal to answer questions relating to his possible disloyal or subversive activities or affiliations must be brought under the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726."

But the question put to Beilan, although having to do with his past loyalty or disloyalty, was deemed to have been a proper question for the purpose of eliciting information concerning his fitness for the job of teacher. We held in *Beilan* that even though the question did relate to the subject of subversive activity, it was still in order for Beilan to be adjudicated under the Act of May 18, 1911, as amended by the Act of June 20, 1939, P. L. 482, which enumerated the grounds for dismissal as "immorality, *incompetency*, intemperance, cruelty, persistent negligence, mental derangement, and persistent and wilful violation of the school laws of this Commonwealth."

Speaking for this Court, Justice Chidsey said:

"Appellee was charged with incompetency based on his refusal to respond to a pertinent inquiry as to his fitness to be a teacher. The Loyalty Act preempted the field of dismissal for subversion as therein defined, but other causes of dismissal remained unaffected. Section 15 of the Loyalty Act expressly provides: 'The provision of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law.' *Moreover the Loyalty Act provides neither the procedure nor the substantive law with respect to the duty of a teacher to answer proper questions. The provisions of the School Code do provide the basis for dismissal of a teacher who refuses to answer such questions.*"

Isn't that what is involved here?

Justice Chidsey said further:

"Certainly a teacher who refuses to respond to a pertinent inquiry relative to his fitness to teach is not competent within the broad reach of that term, *whether the inquiry concerns loyalty or any other proper subject of inquiry.*"

I should think that that pronouncement ought to dispose of the case at bar, if we are to have respect for stare decisis. But the Majority says it will not be controlled by stare decisis where what this Court said only four years ago conflicts with what it wants to do today. Thus, on the concluding page of its Opinion, the Majority didactically announces:

"Anything in the Beilan case to the contrary is herewith overruled for the future."

This, I must say in all deference, is a rather Procrustean way of deciding cases. The Majority uses the *Beilan* case where it serves its purpose and then chops off that part of the case which does not happen to fit the par-

ticular theory it has placed on the table for measurement, appraisal, and supposed justice.

I look with considerable doubt on the propriety of this kind of procedure, and I regard with grave misgivings this decision which certainly does nothing for respect of law, dignity of precedent, and upholding of school authorities seeking desperately to keep the schools free of those who would poison the founts of learning.

The Majority cites the case of *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551, as controlling, but the *Slochower* case is utterly inapplicable to the legal question here involved, and the facts in that case are so different from those in this case that only a discursive liberality can justify making a comparison between them. However, since the Majority Opinion devotes three full pages to a discussion of *Slochower*, I feel constrained to reply with at least one paragraph, and it is this.

A section of the New York City Charter provided that if any city employee, called to testify regarding his official conduct, declined to testify, pleading the privilege against self-incrimination, he would be forthwith discharged. Slochower refused to testify before a Congressional committee, invoking the constitutional privilege, and was discharged. The Supreme Court of the United States reversed, holding that Slochower was denied due process since he was not accorded a hearing whereby he might defend himself. The case here is entirely different. The appellants were officially notified in writing of their misconduct. They were given a hearing before the School Board where they had a full opportunity to testify, although only one availed himself of that opportunity. They were then accorded an appeal to the Superintendent of Public Instruction, who reviewed the case. They were then allowed an appeal to the Court of Common Pleas where their case was argued and reviewed again. It can't possibly be said, with any regard for historical fact, that the appellants' dismissals were autocratic and that they had no hearing.

The Majority veiledly suggest that the hearings given the appellants were not "full" hearings. I have no way of puncturing this rhetorical veil because I do not know what the Majority assumes the veil conceals. I only know I read the record and found that the appellants were treated with punctilio and respect. They had counsel, they had the privilege of cross-examination, they had the opportunity to speak. That two of them refused to testify or speak suggests that perhaps their veils concealed a fault they feared might be revealed under the searching light of cross-examination.

There can be a difference of opinion as to whether the recent decision of the Supreme Court of the United States in *Nelson and Globe v. County of Los Angeles* is applicable to the present litigation. I believe that, if applicable, the decision supports the School Board. Globe was discharged from his county position because, in defiance of a California statute, he refused to answer a question put by a subcommittee of the House Un-American Activities Committee, pleading the Fifth Amendment. Globe argued that he was discharged simply because he invoked the constitutional privilege. The Supreme Court affirmed the dismissal and said:

> "If Globe had simply refused, without more, to answer the Subcommittee's questions, we think that under the principles of *Beilan* and *Lerner* California could certainly have discharged him. The fact that he chose to place his refusal on a Fifth Amendment claim puts the matter in no different posture, for as in *Lerner*, *supra*, at 477, California did not employ that claim as the basis for drawing an inference of guilt. Nor do we think that this discharge is vitiated by any deterrent effect that California's law might have had on Globe's exercise of his federal claim of privilege. *The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security.*"

The School Board here has asserted that the three appellants were not discharged for invoking the Fifth Amendment but for refusing to cooperate with a Congressional Committee seeking information which went to the integrity and the safety of the public schools of Philadelphia. What was said by the Supreme Court in behalf of the State of California, could be said here on behalf of the School Board, namely,

> "The State [Board] may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security."

The Majority here, as is true with so many people discussing the Fifth Amendment, misapprehends the purpose of the Fifth Amendment insofar as it applies to a case of this character. The object of the Fifth Amendment, and its only object, (that is, the part here involved) was to prohibit the coercive obtaining of evidence against an accused. There was a time when prisoners were tortured into "confessions." Since anyone in the vise of excruciating pain may sign or utter self-condemning statements no matter how untrue (in order to obtain relief from agony), the framers of our Constitution set up immunity from self-incrimination for all accused. The reason behind this protection is wholesome and just, and should not be modified, because even today the third degree is not unknown.

However, the Amendment does not stifle the thought processes of the interrogators or spectators and they can evaluate the moral stature of the silent witness, if not his criminal responsibility. When a witness is asked specifically if on a certain day he turned over a government secret document to a Soviet agent and the witness refuses to answer on the ground that his answer may incriminate him, we, who are listening, can see through the mask, and we know that we would never trust that man with a key to our home.

The Majority completely misses the point in this case. As I have said, the only purpose of the Fifth Amendment is

to save a person from giving evidence against himself in a criminal prosecution, not to save him from social ostracism, and not from being discharged as a school teacher if his conduct proves him to be incompetent and unworthy and disloyal. The Fifth Amendment is not a lightning rod to ward off the bolts of condemnation which the pleader of the Amendment himself invites. The Fifth Amendment was not intended to be a job saver. It was not designed to be a reputation protector. It is not a raincoat to keep the wearer free from the mud which he splashes on himself. The Fifth Amendment is not a ship which is unsinkable no matter how many holes the pleader bores into it with the auger of his own bad behavior.

Suppose, instead of asking questions as to whether Deacon had been a member of the Communist Party, the Committee asked him: "Do you sell narcotics to school children?" and Deacon had refused to answer, drawing tightly about him the raincoat of the Fifth Amendment, would not the Board have been justified in rating him "unsatisfactory" at once, without waiting two or three days to do so?

I would like to ask every member of this Court who supports the Majority Opinion if he would want as a teacher of his children a person who, when asked if he trafficked in narcotics with the school children under his charge, replied that he refused to answer. I would like to put to every member of this Court who supports the Majority Opinion whether, as a good citizen, taxpayer, and man of the law, he would not demand that the School Board dismiss such a teacher as not only unworthy morally but wholly incompetent to teach children since it is obvious that a teacher who cannot see the evil of selling marihuana cigarettes to his school children certainly cannot be reliable in teaching any part of the school curriculum.

Suppose Deacon had been asked: "Are you the person who burned down the Epochal High School?" and he replied he would not answer because of the Fifth Amendment,

would the Majority condemn the School Board for separating Deacon from his job?

The Majority says that because the Fifth Amendment is a Federal guarantee, the State may not penalize any person for using it. But I must repeat that the purpose of the Fifth Amendment is to protect its user from improper criminal prosecution, not from any other results which may follow from it, entirely unrelated to criminal prosecution. Deacon, Intille and Atkinson had the constitutional right to refuse to give answers which might incriminate them criminally, but they have no constitutional right to be school teachers. In a celebrated case in Massachusetts where the right of free speech was involved, the illustrious Justice Oliver Wendall Holmes made the significant remark:

> "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman."

Suppose Deacon had been asked: "A year ago you said that your wife died of natural causes, but we now have evidence that she was killed criminally. Did you kill her?" And suppose Deacon had answered: "I refuse to answer that question because the answer might incriminate me." Here he would have availed himself of the Federal right, which the Majority so stresses in its Opinion, but would that Federal right save him from being dismissed as a school teacher? Could a school board keep as a school teacher a person who refuses to answer, when seriously asked the question: whether he is a murderer?

The purpose of the Fifth Amendment is not to save one from results, apart from criminal prosecution, which are natural to a refusal to answer the accusation of an opprobious crime.

Suppose a school physician had been asked if he was infected with a malignant communicable disease and he refused to answer, would the School Board not be justified in

refusing to permit him to treat school children and in discharging him as school physician?

The framers of the Constitution would turn in their graves if they could know how guarantees to protect the liberty of Americans are being used to destroy the very American form of government. The decision of Courts which not only protect potential traitors in their allegiance to hostile foreign powers but which assure them tenure in positions where they can best use their alien ideology against the American form of government are decisions which could cause the statutes of the colonial patriot martyrs to leap from their pedestals and sorrowfully retreat to Valley Forge to weep over the disappearance of principles for which they sacrificed their lives to attain and establish.

The Majority Opinion says:

> "The appellants' pleas of the Fifth Amendment did not prove their incompetency within the meaning of the Public School Code."

Here the Majority ascribes a very narrow meaning to the word "incompetency", as used in connection with the qualifications of a school teacher. Competency, where a school teacher is involved, does not mean mere technical qualification. A person who can carry the contents of the 24 volumes of the Encyclopaedia Brittanica in his head but does not have a page of the moral code in his heart is obviously incompetent to teach school children.

Nor does the word "incompetency" have the lexicographical limitation sometimes popularly supposed. Webster's New International Dictionary defines it as "want of physical, intellectual, or *moral* ability; insufficiency; inadequacy; specif., want of legal qualifications or *fitness*." Funk & Wagnalls Standard Dictionary defines incompetency as: "General lack of capacity or *fitness*, or lack of the special qualities required for a particular purpose." *

* Quoted in Horosko v. Mt. Pleasant, 335 Pa. 369, 374.

This Court in the case of *Horoska v. Mt. Pleasant Township School District*, 335 Pa. 369, 374-375, said with reference to the word "incompetency":

> "The term 'incompetency' has a 'common and approved usage.' The context *does not* limit the meaning of the word to lack of substantive knowledge of the subjects to be taught. *Common and approved usage give a much wider meaning.* For example, in 31 C. J. with reference to a number of supporting decisions, it is defined: 'A relative term without technical meaning. It may be employed as meaning disqualification; inability; incapacity; *lack of ability, legal qualifications, or fitness to discharge the required duty.*' In Black's Law Dictionary (3rd edition) page 945, and in Bouvier's Law Dictionary, (3rd revision) p. 1528, it is defined as 'Lack of ability or *fitness to discharge the required duty.*'"

With these authoritative definitions and expositions in mind, the exclamation point employed in the Majority Opinion to cynically condemn the School Board for dismissing Deacon as incompetent because of his refusal to answer the Congressional Committee's questions, does not carry the sardonic implication intended for it.

Since Deacon was admittedly a Communist for six years, during which time he was also a school teacher, his refusal to talk about the machinations of the Communist Party was in itself evidence of incompetence in its revelation of a lack of awareness of his moral responsibility to cooperate with the Congressional Committee and to give it the information he possessed. If, after six years of being an active member of the Communist Party, he did not know what the Communist Party stands for, this was about the most conclusive evidence of school teacher incompetence that one could imagine—exclamation point. Such ignorance and incompetence would be the ignorance and incompetence

of a worker carrying a lighted torch into a gunpowder magazine.

If a school teacher is indeed a Communist he obviously is not qualified to remain as a school teacher in the public schools of the United States. If he is not a Communist but refuses to say he is not a Communist, and therefore permits the inference that he may be, he thereby conclusively establishes lack of character and reliability which would make him utterly incompetent as a school teacher. The captain of a ship who refuses to haul down the skull and crossbones which, correctly or incorrectly, flies from his masthead, cannot complain if he is fired on for being a pirate.

Now, on what basis did the School Board conclude that the three appellants in this case were incompetent to teach school children. Superintendent Hoyer testified with respect to Deacon:

> "I have checked three items that enter into this rating of unsatisfactory. One of these is the item of civic responsibility, and I have checked that as unsatisfactory because I believe Mr. Deacon's refusal to cooperate with the committee before which he appeared warrants that rating. I am firmly convinced that a person, any person, any citizen, should cooperate with a properly constituted committee of the Congress, and I think a teacher especially ought to do that. Mr. Deacon did not do it, and I therefore considered that his concept of civic responsibility was a poor one and rated him unsatisfactory on that score.
>
> "I have marked also the question of judgment. I think his judgment in the line of action that he took was faulty. I think his judgment in being in a position where he would have to take that line of action was faulty, and I therefore marked judgment as unsatisfactory.
>
> "I also marked the question of ideals, appreciations and ideals, but particularly ideals here, as unsatis-

factory, because I am convinced that a teacher should have such ideals of relationship to his government, such ideals of citizenship, that he will cooperate under the circumstances considered here. I therefore rated Mr. Deacon as unsatisfactory on those three counts."

His testimony with regard to Atkinson and Intille was approximately the same. Of Atkinson, he particularly noted:

"And I think, both by way of indicating her general attitude toward this situation and because of the example which it showed to pupils in her school and those with whom she was associated, that it indicated unfitness to be a teacher."

Of Intille, he specified, in addition to the general rating of her incompetence:

"I considered her examination before the Committee as an evidence of extreme lack of civic responsibility on her part. And civic responsibility is one of the major elements in the competence of a teacher to appear before children in our schools.

"I marked also the item of appreciation and ideals—the ideals part is the important part—because I believe that a teacher who has the proper ideals with regard to her responsibilities to the government of our country will not take the position which Mrs. Intille took in this case. I therefore marked her unsatisfactory in connection with this item also."

It must be kept in mind throughout the consideration of this case, as already stated, that the School Board did not discharge the three appellants for invoking the Fifth Amendment as protection against a possible criminal prosecution, but for their refusal to cooperate with a Congressional Committee officially interrogating about conditions in the Philadelphia schools. If the appellants had pleaded the

First or Ninth Amendment or no Amendment at all and had simply refused to answer proper inquiries put to them, their incompetency in the circumstances, as we will now relate them, would equally have been established."

The brief filed by the School Board very properly points out:

> "One of the purposes of the public school system is the education of citizens for the rights and obligations of citizenship in a democracy. The public schools do not exist solely for the purpose of training the child to earn his living. Such a limited purpose, by itself, would scarcely justify the huge sums raised by taxation to support and finance the State's vast public educational program. The State and Nation are interested to benefit from the education of citizens. It is intended that pupils shall understand the meaning of patriotism, appreciate the concept of loyalty to State and Nation, and value the heritage of the American way of life. These purposes are explicit in the Public School Code (Act of March 10, 1949, P. L. 30, §§ 1511, 1515, 1605, as amended; 24 P. S. §§ 15-1511, 15-1515, 15-1605)."

It will be seen by these references to the Public School Code that the three appellants had certain obligations to discharge and duties to fulfill in answering the questions put to them by the Congressional Committee inquiring into conditions in the very schools in which the appellants were teaching. If they were to be rated as satisfactory school teachers they were required to live up to the requirements of the School Code. This is a point wholly ignored by the Majority decision.

Now, no one can deny that there was much discussion in 1953-54 to the effect, rightly or wrongly, that many persons in the public school system of the United States had succumbed to the Communist ideology. The subject was debated in the newspapers, on radio and television, from the platform, in the pulpit and every other form of public ex-

cussion.' Naturally, it occupied the very serious concern of both Houses of the American Congress. A report published by the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate in July, 1953, declared:

"'World Communist leaders have made schools and colleges of the United States a target of infiltration activity a part of the program to destroy the United States.'"

"'A communist educator, because of his submission to a totalitarian organization, cannot maintain the standards of academic freedom and objective leadership and be loyal to the regulations of local authorities.'"

"'Communist teachers use their positions in the classroom and in extra-curricular activities to subvert students and other teachers and the public to promote the objectives of Communism.'"

"'The testimony before the Subcommittee has convincingly demonstrated that such teachers [Communist] are not only actively engaged in injecting Communist influence into our educational institutions but that they do this through oblique and indirect methods under Communist Party direction.'"

"'Teachers [Communist] are subjected to a thorough indoctrination on joining the Communist Party in order to insure their conformance to the party line.'"

"'On April 17, 1953, Herbert Philbrick, former FBI undercover man in the Boston Communist Party, testified to the existence of an Education Commission in each district of the Communist Party, as well as nationally.'"

"'The evidence shows that the activities of the Communist Party are subject to the most rigorous review and discipline of the Communist hierarchy.'"

It is with this background of disturbing revelations that the Committee on Un-American Activities of the United States House of Representatives came to Philadelphia to inquire into conditions in the Philadelphia School System. The Committee knew that Bella Dodd, an ex-Communist school teacher, had testified that out of a membership of 14,000 school teachers in the New York Teachers Union, 1000 of the teachers were Communists. What were conditions in the Philadelphia schools? Not only did the Committee have the right but the duty to know so that they could intelligently and efficiently formulate legislation which would protect the school children from subversive influences which, unless checked, could, through the coming years, bring about the eventual destruction of the American way of life.

Thus, it was not an idle visit which brought the House Un-American Activities Committee to Philadelphia. Nor was it a punitive expedition. It was not interested in bringing criminal prosecutions against Deacon, Intille and Nelson or anyone else who might come before the Committee. It wanted information, and the teachers who were duly subpoenaed before it had the duty, under the School Code, to say nothing of loyalty to the United States, to give them the information within their personal knowledge to give. The Committee wanted to know to what extent, if any, the Communist Party had infiltrated into the Philadelphia school system.

It had evidence that Deacon had at one time been a member of the In Town Department of Section 8 of the Communist Party. He was asked if this was true. He refused to answer on the ground of the Fifth Amendment. He said he took the loyalty oath in April, 1952, and that he was not presently a Communist. However, if he was a member of the Communist Party from 1939 to 1945, and later admitted to the School Board, he was in an excellent position to help the Committee by telling its members and

through them, Congress itself, as to how far the Communists had infiltrated into the Philadelphia school system.

Deacon was in an especially excellent position to help Congress by a full and frank disclosure of what the Communists were doing in the Philadelphia schools because, since the Statute of Limitations had run in his favor, he could not be criminally prosecuted for Communist membership between 1939 and 1945. His refusal to testify, therefore, cannot be excused on any supposition that he was exercising a Constitutional privilege in order to avoid criminal prosecution. He had no Constitutional privilege to advance. His refusal to testify was a manifestation of arrogance, defiance and contempt for the constituted authorities legitimately inquiring into a situation which required investigation.

Deacon's refusal to testify could well have been interpreted as a lingering adherence to the tenets of the Communist Party, and a reluctance to arm the United States authorities with information and data which would help this country fight the international conspiracy of which he had once been an active dues-paying member. In any event, how can there be any doubt that he demonstrated himself morally unfit to be a teacher of school children in our public schools? How can there be any doubt that by his contumelious conduct he proved himself to be incompetent?

A school teacher must conduct himself in such a manner as to command respect, or his efficacy as a teacher is lost. Anything which a teacher does which disgraces him in the eyes of the law-abiding community in which he lives and teaches affects his competency to teach. The Court of Common Pleas of Philadelphia County which approved the dismissal of Deacon properly and cogently said:

> "As was pointed out both in the Horosko case and in the opinion of the United States Supreme Court in the Beilan case, a teacher who does not conduct himself in such a way as to command the respect and good will of

> the community is incompetent. It would seem clear that a teacher who fails to answer pertinent questions before a Congressional Investigating Committee is much more likely to lose the respect and good will of the community than a teacher who refused to answer the same questions in the privacy of the office of the school authorities."

The attitude of Mrs. Intille and Mrs. Atkinson was no less demonstrative of their incompetence as school teachers. Of Mrs. Intille, Judges Alessandroni and Reimel properly said:

> "Certainly the refusal of appellant to answer questions of a duly constituted Committee of our Congress is a dreadful example for a teacher to set for pupils. Whether appellant is a subversive or not, such conduct before a committee of the highest legislative branch of our government can only foster in the impressionable children under her tutelage a settled contempt and arrogance for our country and its lawmakers."

Judge Milner who passed on the Atkinson case in the Court below said:

> "The term 'incompetency' as used in the Public School Code of Pennsylvania is not confined to the classroom activities of a teacher or to the teacher's educational background or master of the teaching art. A schoolteacher's influence upon her pupils is not limited to what she says and does in the schoolroom, and a teacher's right to teach cannot depend solely upon her conduct in the school . . . A teacher's incompetency may be determined on the basis of her actions entirely outside the classroom and outside school hours, where her conduct tends to bring her into public disrepute and to forfeit the respect and confidence of the community."

The Majority Opinion does not touch upon this vital phase of the case at all. It ignores what Judge Milner also ably said:

"She [Mrs. Atkinson] was not branded incompetent because she was or had been a Communist. She was regarded by her employing board and by her superintendent as unfit to continue as a teacher because of her lack of frankness, candor, and cooperation; because, in a time of national stress and danger, perhaps the gravest danger that has ever confronted the nation, she took refuge behind a cloak of secrecy."

The Supreme Court of the United States said in the same *Beilan* case we have discussed, 357 U. S. 399:

"We find no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness. Fitness for teaching depends on a broad range of factors."

The Supreme Court of the United States said in the case of *Adler v. Board of Education of New York*, 342 U. S. 485, 495:

"It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will . . . It is equally clear that they have no right to work for the State in the school system on their own terms. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

Of all this, the Majority shows no interest. Instead, it speaks of *locus penitentiae* for the appellants, especially Beacon. It chastises the School Board for not being more merciful toward an ex-Communist who is now sorry. But, as I have said before, Beacon was not sorry for what he had done in collaborating with other members of the Communist Party of the United States, the Communist Party that was responsible for the theft of our atomic bomb secrets, the Communist Party that has sheltered and aided Soviet spies, the Communist Party that has approved of all

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Petitioner,

v.

ANGELINA INTILLE, THOMAS DEACON
and SADIE T. ATKINSON,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania.

Brief for Respondents in Opposition.

A. HARRY LEVITAN,
1412 Fox Building,
Philadelphia 3, Pa.

FRANKLIN POUL,
12th Floor Packard Bldg.,
Philadelphia 2, Pa.
Attorneys for Respondents.

International, 711 So. 50th St., Phila. 43, Pa.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinions in the Supreme Court of Pennsylvania and in the Courts of Common Pleas of Philadelphia County are appended to the Petition for Writ of Certiorari.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257(3). But the Supreme Court of Pennsylvania has held in these cases that public school teachers having tenure may not be dismissed on the statutory ground of "incompetency" as contained in the Pennsylvania School Code of 1949, Art. XI, § 1122, where the charge of incompetency is based solely on the fact that

the teachers, while being questioned by a Congressional Committee, refused to answer questions as to past Communist Party membership on the basis of a Fifth Amendment claim of privilege. No question under the Constitution or laws of the United States is raised by this decision.

The Pennsylvania Supreme Court also held that the dismissals of these teachers violated the due process clause as well as the privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution. The fact remains, however, that the Pennsylvania Supreme Court held respondents' dismissals invalid because, as a matter of state law, their conduct did not amount to incompetency. The decision, therefore, was based on adequate non-federal grounds and there is no question over which this Court has jurisdiction.

QUESTION PRESENTED.

Should this Court review a decision of the Pennsylvania Supreme Court holding that the refusal, on a plea of the Fifth Amendment privilege, by public school teachers having tenure, to answer questions as to past Communist Party membership asked by a Congressional Committee, did not constitute incompetency within the meaning of the Pennsylvania Public School Code of 1949, simply because that decision also ruled that the dismissal of petitioners deprived them of constitutional rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions are set out in the Petition for Writ of Certiorari. An additional statutory provision involved is the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, §§ 3, 5, 6, 7, 10, 15a; 65 Purd. Pa. Stat. Ann., §§ 213, 215, 216, 217, 220, 225(a). It is printed in the appendix hereto, *infra*, pp. B 1a-B 5a.

STATEMENT OF THE CASE.

This is a proceeding under the tenure provisions of the Pennsylvania Public School Code, Act of March 10, 1949, P. L. 30, § 1122, et seq., as amended, 24 Purd. Pa. Stat. Ann. § 11-1122 et seq. The three respondents, public school teachers having tenure, were dismissed in 1954 by the Board of Public Education, School District of Philadelphia, on the ground of incompetency contained in that Code.

The charge and the finding of incompetency, in each case, was based solely on the refusal to answer questions of the House Committee on un-American Activities relating to past Communist associations, under pleas of the Fifth Amendment (57a, 63a). The use of the privilege was held to be proof of a lack of civic responsibility and proper professional ideals, and of faulty judgment, and it was therefore equated with incompetency.

It was agreed that there was no statute or rule promulgated by the Board of Education which dealt in any way with a teacher's use of the Fifth Amendment in any proceeding.

The Superintendent of Public Instruction affirmed each dismissal. Separate appeals from that order were dismissed by Courts of Common Pleas of Philadelphia County. The separate appeals taken by the respondents to the Supreme Court of Pennsylvania were consolidated. That Court, by a six-to-one decision, reversed the decisions below. It held that the dismissals violated the due process clause and the privilege and immunities clause of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Pennsylvania also specifically held that respondents' refusal to answer a Congressional Committee's questions relating to possible past disloyal associations did not constitute incompetency within the intended scope of that term as used in the Public School Code of Pennsylvania (56a, 72a-73a).

ARGUMENT.

Respondents had acquired tenure and could be deprived of their positions as teachers only for the causes enumerated in the Pennsylvania Public School Code of 1949 (1a). Petitioner dismissed them on the ground of incompetency, basing its action entirely on the fact that each had claimed the privilege against self-incrimination to refuse to answer a Congressional Committee's questions about former Communist Party affiliations.

Quite aside from the constitutional rulings challenged here, the Supreme Court of Pennsylvania held that respondents' dismissals were invalid because as a matter of state law their conduct did not amount to incompetency.

At the outset of the opinion the Court made clear that the case presented not only the constitutional issues, but also the "additional question" of whether respondents' plea of privilege "constituted incompetency within the intent of Pennsylvania's Public School Code of 1949" (56a).

After disposing of the constitutional points, the Court concluded the opinion with the distinct and independent holding that respondents' refusal to answer the questions did not amount to incompetency (72a-73a).

This holding, far from being "interwoven" with constitutional determinations, rested entirely on an analysis of the scope of "incompetency" under the Public School Code of 1949, in the light of the subsequent provisions of the Pennsylvania Loyalty Act of 1951 (B 1a-B 5a). The Pennsylvania Supreme Court declared that the latter statute is the exclusive remedy for disloyal or subversive activities or affiliations. It then held that since the questions asked of petitioners were relevant only to possible disloyalty or subversion, the mandatory procedures established by the Loyalty Act could not be ignored by the device of treating the refusal to answer as incompetency within the meaning of the Public School Code.

The Court was at pains to make clear that the decision was broader than the constitutional issues alone would have warranted. From the constitutional point of view, it was important that the dismissals had been based on a claim of federal privilege in a federal proceeding. This was what made the case different from *Board of Public Education v. Beilan*, 357 U. S. 399 (1958) (involving the questions of an administrative superior) and brought it within the authority of *Slochower v. Board of Higher Education of New York City*, 350 U. S. 551 (1956) (61a-67a). But, in defining incompetency as a matter of state law, the Pennsylvania Supreme Court went far beyond this. For it declared that where the questions relate to disloyalty or subversion, Pennsylvania will not permit dismissal for incompetency "whether the question propounded be by a Congressional Committee or by the Board of Education itself" (72a). "Anything in the *Beilan* case to the contrary is herewith overruled for the future" (73a).

The law of Pennsylvania is now declared to be that it is not incompetency per se for a teacher to refuse to answer questions about former Communist affiliations. If a teacher's tenure rights are to be declared forfeit as a result of such refusal, it can only be by way of proceedings under the Pennsylvania Loyalty Act (B 1a-B 5a). This result is reached by a natural interpretation of the relative ambits of the two Pennsylvania statutes. It poses no question over which this Court has jurisdiction.

CONCLUSION.

The decision of the Court below is based on an adequate non-federal ground, and the Petition should be denied.

Respectfully submitted,

A. Harry Levitan,
Franklin Poul,
Attorneys for Respondents.

Appendix.

ADDITIONAL STATUTORY PROVISIONS.

Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purd. Pa. Stat.:

Ineligibility for Employment or Appointment to Office.

No subversive person, as defined in this act, nor any person as to whom on all the evidence there is reasonable doubt concerning his loyalty to the government of the United States or the Commonwealth of Pennsylvania, shall be eligible for employment in or appointment to any office or any position of trust or profit in the government of or in the administration of the business of this Commonwealth, or of any school district, county, municipality or other political subdivision of this Commonwealth. 1951, Dec. 22, P. L. 1726, § 3. 65 Purdon's Pa. Stats. Ann. § 213.

Present Employes; Oath; Discharge.

The appointing authority of each person, including teachers and other employes of the public school system who, on the first day of March, one thousand nine hundred fifty-two, shall be in the employ of the Commonwealth of Pennsylvania or of any of its political subdivisions, other than those holding State or local elective offices of any kind, shall require such person to, and every such person shall, on or before the first day of April, one thousand nine hundred fifty-two, make a written statement, under oath or affirmation, which statement shall contain notice that it is subject to the penalties of perjury, and shall be in the following form:

"I,....., do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of ..... with fidelity.

"And I do further swear (or affirm) that I do not advocate, nor am I knowingly a member of any organization that advocates, the overthrow of the government of the United States or of this Commonwealth by force or violence or other unconstitutional means, or seeking by force or violence to deny other persons their rights under the Constitution of the United States or of this Commonwealth.

"And I do further swear (or affirm) that I will not so advocate nor will I knowingly become a member of such organization during the period that I am an employee of the Commonwealth of Pennsylvania (or political subdivision thereof)."

Any persons failing or refusing to execute either statement required hereby shall be discharged immediately by the proper appointing authority. 1951, Dec. 22, P. L. 1726, § 5. 65 Purdon's Pa. Stats. Ann. § 215.

Investigations.

Any appointing authority may at any time, upon written complaint, investigate any person, including teachers and other employes of the public school system, appointed or employed by him, to determine whether he is a subversive person. If, upon any investigation, it appears that such person is a subversive person, the person shall immediately be privately and confidentially notified of the recommendation by the appointing authority. No public announcement, release, statement or comment concerning the investigation, recommendation or notification shall be made

by the appointing authority in any way whatsoever, unless and until the person so notified is discharged under section seven of this act. 1951, Dec. 22, P. L. 1726, § 6, 65 Purdon's Pa. Stats. Ann. § 216.

Hearing Before Appointing Authority.

Any person, including teachers and other employes of the public school system, who has been so notified under this act, shall have a right to a hearing before the proper appointing authority within thirty (30) days after receiving said notification. If no hearing is requested within thirty (30) days after said notification is received, the person shall immediately be discharged by the appointing authority. He may appear before such appointing authority personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf through witnesses. The person who has been so notified shall at the same time be further informed in writing of such hearing, at least ten days before the day set for the hearing, and shall be informed therein of the nature of the charges against him; and the person who has been so notified shall be informed in the notice (1) of his right to reply to such charges in writing within ten days after the date of service, (2) of his right to a hearing on such charges before the appointing authority, which hearing may be private and confidential or may be public, at the option of the person so notified, and (3) of his right to appear before such appointing authority personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his own behalf through witnesses. If, after due hearing, it is determined by the appointing authority by a fair preponderance of the evidence that the person who has been so notified is a subversive person, as defined in this act, the person who has been so notified shall be discharged; otherwise, the recommendation shall be ignored. Said determination shall be made within sixty

(60) days after the hearing. If the appointing authority shall be comprised of three or more members, a vote of two-thirds of the members shall be necessary in order to discharge a person. 1951, Dec. 22, P. L. 1726, § 7. 65 Purdon's Pa. Stats. Ann. § 217.

Appeals to the Superintendent of Public Instruction.

After a final determination of discharge under this act by an appointing authority, any teacher or other person employed in the public school system of the Commonwealth who believes himself aggrieved by such determination may appeal on the record from the determination by an application in writing to the Superintendent of Public Instruction of the Commonwealth within twenty days after receiving written notice of such determination. The superintendent shall set a time and place for the hearing of the appeal, which hearing shall be not more than thirty (30) days after receipt thereof, and give due notice of said hearing to the appellant and to the appointing authority whose determination is under review. The hearing shall be held by the superintendent or by a person or persons, not exceeding three, designated by the superintendent in writing to hear the appeal in his behalf. The superintendent, in his discretion, may designate such person or persons to hear such appeal and to report to him. The persons so designated by the superintendent may be officers or employes of the civil service of the Commonwealth. The person or persons holding the hearing may make such inquiry as may be deemed advisable. Within sixty (60) days after the hearing on appeal, the superintendent shall affirm or reverse the findings and determination under review, and, in the case of reversal, shall order the reinstatement of the appellant, who shall be entitled to back pay from the date of his discharge. 1951, Dec. 22, P. L. 1726, § 10. 65 Purdon's Pa. Stats. Ann. § 220.

Effect and Applicability of Act.

(a) The provisions of this act shall not affect the right to discharge any person for any cause other than those provided for by this act or without cause under existing law. No procedure provided by any existing tenure or civil service law shall be applicable in any proceeding under this act. 1951, Dec. 22, P. L. 1726 § 15(a). 65 Purdon's Pa. Stats. Ann. § 225(a).